No. 15966

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MOUNTAIN PACIFIC CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA; THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SEATTLE CHAPTER, INC.; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, TACOMA CHAPTER; INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 242, AFL-CIO; AND WESTERN WASHINGTON DISTRICT COUNCIL OF INTERNATIONAL HODCARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
and on
PETITION FOR REVIEW OF SAID ORDER

BRIEF OF UNION RESPONDENTS JOINTLY ANSWERING BRIEF OF THE NATIONAL LABOR RELATIONS BOARD
and
BRIEF IN SUPPORT OF PETITION FOR REVIEW

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MISCELLANEOUS

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I.

STATEMENT OF THE CASE

A. Proceedings.

1. *Charges Of Unfair Labor Practice.*

Cyrus Lewis filed his charge against Local 242 on May 11, 1956, within the 6-months' limitation of the execution of the Labor Agreement, but the charge was not based on the agreement or its implementa-

tion. Instead, it alleged discriminatory practices by Local 242 with "various construction companies."[1]

Thereafter, Lewis filed charges against the AGC-Chapters and the District Council alleging violations of the discrimination and coerce-restrain provisions. None of the charges alleged any violation from the "execution" of the agreement.

2. *The Consolidated Complaint.*

The Complaint was isued on September 20, 1956 which alleged in paragraph VII that the agreement was since the date of its execution "published, maintained and continued in effect" by all respondents; in paragraph XI, the AGC-Chapters were alleged to have violated only Sec. 8 (a) (1) of the Act, thus abandoning the allegation of a violation of Sec. 8 (a) (3)[2]; in paragraph XII the Council was alleged

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[1]The Charge did not allege the existence of any labor agreement, nor the execution of any agreement by Local 242 nor identify the AGC-respondents:

"In keeping with an illegal hiring hall arrangement, the International Hod Carriers, Building and Common Laborers Union, Local 242, AFL-CIO, has since on or about February, 1956, refused to place on the hiring or referral list for employment, thereby discriminating against Cyrus Lewis in regard to hire with various construction companies in the Seattle, Washington area. In view of the hiring arrangement, it would be futile to apply for employment without being referred by the Union."

The name of the employers was stated thus: "Various construction companies."

[2]This paragraph alleges:

"XI

"The AGC Chapters, during the six-month period prior to the filing of charges by Lewis, and since then, (1) by continuing the 1956 Agreement in effect with the Council, wherein it was provided that member local unions of the Council were to function as the employment recruiting office and hiring hall of the employer members of the AGC Chapters, in the absence of providing affirmative assurances against discrimination in the selection of employees for hire, and by continuing the 1956 Agreement in effect

to have violated both the discrimination and coerce-restrain provisions "by continuing the 1956 agreement in effect under the circumstances and in the manner specified in paragraph XI"; and in paragraph XIII alleging that Local 242 has "since January 1, 1956, by continuing the agreement in effect" violated both the discrimination and coerce-restrain provisions.

It is noted that the allegations implicating all of the respondents, to-wit, paragraphs XI, XII, and XIII do not charge the execution of the agreement as being violative of the Act; that the AGC-Chapters are not accused of discriminating against Lewis; and that the maintenance of the alleged illegal agreement is violative of the discrimination provision and derivitively, but not independently, violative of the coerce provisions. The subject matter of the complaint is limited to the agreement between the Chapters on one hand, and the Union and District Council on the other hand; to alleged implementation of the contract between the Union and AGC-affiliates only and not contractors generally; to alleged discriminatory practices as to only one man, Lewis, and not employees generally or prospective employees generally.

The General Counsel at the hearing limited himself generally to the issues, and the Trial Examiner

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with labor organizations which (2) were obligated to give preference to their members in dispatching applicants for employment, and (3) did give such preference to their members, have been and are fostering and establishing hiring practices among the employer members of the Chapters which have discriminated with respect to the hire of Lewis and other non-union workmen, to encourage membership in a labor organization in violation of Section 8 (a) (3) of the Act, and thereby have been and are interfering with, restraining and coercing employees and applicants for employment in the exercise of their right as guaranteed in Section 7 in violation of Section 8 (a) (1) of the Act."

likewise limited himself in his findings to the issues. The Board's Opinion, however, must be scrutinized to keep it within the issues.

3. *Hearings, Intermediate Report and Exceptions.*

Hearings were conducted on Oct. 26-27, 1957 at which time all allegations of the complaint were put in issue by answers in general denial, except the existence of the parties was admitted (R. 8). Exceptions were filed by the General Counsel but not by any of the respondents. The only finding and recommendation unfavorable to any of the respondents was the finding that Local 242 had violated the Act by inducing Lewis to drop the charges.

4. *Decision and Order, Dissenting Opinion, and (majority) Opinion.*

On December 14, 1957, the Board rendered its majority Decision and Order (R. 44; 119 NLRB No. 126) and on the same day member Murdock rendered his separate opinion (R. 55) concurring in part and dissenting in part (R. 63). We believe that Murdock misunderstood the findings in the case. An abstract of his opinion and an analysis thereof appears in Appendix No. 4 and 5.

5. *Petition for Enforcement and Petition for Review.*

The General Counsel filed his petition for enforcement in this court and respondents have filed separate petitions for review.

B. Position of the Parties and Counsel.

To simplify the problem of adjudication, we have removed from our argument disputes over the evidence. We accept the Trial Examiner's findings of fact. We accept the Trial Examiner's recitals of the

evidence where the Trial Examiner has made them the basis of findings of fact. We vigorously oppose any attempt to convert these recitals into non-administrative findings of fact. Our disagreement that some of these findings are not supported by substantial evidence is indicated by the asterisk. These exceptions are argued in "V. Erroneous Findings Not Supported by Substantial Evidence."

A different problem is presented by the Board's findings of fact. The Board has misapplied its own findings in its implementation holding. We are in serious disagreement with the General Counsel over what are recitals of evidence in the Board's Opinion and what are the findings of the Board. Mentally, we can accept the Board's findings, but on the record, because of a fear of misunderstanding we cannot accept them.

1. ***Positions on Issue of per se Illegality of the Contract.***

The Trial Examiner held that the contract was not illegal *per se* as a matter of law. The Board held that it was illegal as a matter of law. The General Counsel does not present this issue to the court. The General Counsel has commingled *per se* considerations with "reasonable man", and non-administrative findings of implementation and unfair labor practices.

2. ***Positions on Issue of Implementation of the Contract.***

The Trial Examiner found that there were no requisitions for hodcarriers in the period prior to May 17 (which is the terminal date of our inquiry) by contractors affiliated with the AGC-Chapters. He recited that there were requisitions by other employers, *, but since the issues are limited to affiliates of the Chapters, he found that the contract was

not implemented. (R. 33-34, 35). The Board did not find implementation (SR. 197, 207), but nevertheless misunderstood its footnote No. 3, and held that there was "implementation of the unlawful contract in the continuous rejections of Lewis' applications" for work. Not having found any discriminatory conduct under the issues, this is in effect a holding that any implementation of an unlawful contract is illegal. For this, they have allowed back pay to Lewis.

The General Counsel presents both grounds, namely that there were requisitions by AGC-affiliates, assumes that Lewis would be qualified to perform the jobs, and argues that Lewis implemented the unlawful contract; and secondly, that the implementation of the contract was by unlawful means, that is, discriminatory practices. As to the first, he has also misunderstood the findings of the Trial Examiner and the Board that there was no implementation of the contract. As to the second, he makes non-administrative findings.

The Trial Examiner found no illegal implementation because the contract was not illegal and any implementation in a legal manner would be lawful; and secondly, since there were no requisitions, it could not be implemented in any event.

The Board found an illegal implementation because the contract was illegal, and misunderstood its own findings by assuming that there were requisitions from the AGC-affiliates and assuming that Lewis was qualified to be dispatched. The General Counsel made the same mistake, and further found illegal implementation based on his non-administrative finding that Lewis was discriminated against for non-membership in the union.

3. *Positions as to Lewis.*

The Trial Examiner taking *per se* views of the "clause, implementation and Lewis", found no back pay in order, and for the further reason that the contract could not possibly be implemented to Lewis' prejudice because there were no requisitions.

The Board took *per se* views of the "clause, implementation and Lewis", and ordered back pay, on the mistaken holding that there were job requisitions from AGC-affiliates and the Board assumed that Lewis was qualified to be dispatched.

The General Counsel commingled "per se", with reasonable man, with the non-administrative finding that there were jobs available, and that Lewis was qualified. The General Counsel argued that back pay was in order for this reason, and because Lewis was discriminated against generally, although this was not alleged, nor was it the basis of findings by the Trial Examiner or the Board.

4. *Summary of Positions.*

(a) The Trial Examiner.

The clause it not illegal, therefore, implementation in a legal manner is not unlawful. There was no implementation under the issues because there were no requisitions by AGC-affiliates. There is evidence of requisitions by other employers *, but this is outside the issues. There is evidence of discriminatory practices by the union, but general discriminatory practices is outside the issues. These practices were not applied to the contract nor to the AGC-affiliates because there were no requisitions. Lewis is not entitled to back pay because he was not discriminated against under the issues.

(b) The Board.

The clause is illegal and therefore any implementation is illegal. The Board mistakes its findings and holds that there were requisitions from the AGC-Chapters, assumes that Lewis was qualified to be dispatched, and therefore finds implementation. The Board did not find that Lewis was denied a job, because of the discriminatory practice of the union to prefer members. The Board found the coerce-restrain violations derivitively.

(c) General Counsel.

The Trial Examiner and the Board considered the "clause, implementation and Lewis" in their *per se* aspects. The General Counsel argues that the court must consider how employees "reasonably feel" about traditional hiring halls and building construction hiring halls in particular, and consider the illegal practices of the union to discriminate in favor of its members. We thus get from the General Counsel a distorted view of the "clause, implementation and Lewis."

C. Summary of the Facts.

While there are few disputes as to what the evidence showed, there is dispute as to what the findings are and what effect should be given to the evidence and the findings by this court. Brevity at this time is a virtue.

The Seattle and Tacoma Chapters are separate corporations (R. 81, 92, 98) whose members are engaged in building construction in their respective areas. (R. 104). The Mountain Pacific Chapter's members are engaged in highway and heavy construction. In Seattle, the employees are separated into two unions on the same basis as the Chapters.

That is, the respondent Local 242 includes within its membership employees who are qualified to work for the members of the Seattle Chapter. The employees who are qualified to work for the members of the Mountain Pacific Chapter belong to a sister union of Local 242, namely Local 440 which is not a respondent herein. (R. 93, 99-100, 101, 242). The Chapters are not engaged in construction or commerce. (R. 82, 90, 91, 98, 100).

Lewis was a former member of Local 242 which has two classes of employees with different skills, different employers, different practices and who are not interchangeable. (R. 14-15). Lewis was a hodcarrier and he would never be employed by any member of the Mountain Pacific Chapter. (R. 74, 99). In fact, Lewis had never worked for any member of any of the Chapters, nor had he ever requested work from them. (R. 84, 91, 100).

During the period from March 15, 1956 to May 14, 1956 Lewis was repeatedly applying for work from Local 242, and was repeatedly told that there was no work. During this period, the Trial Examiner found that no member of any of the Chapters had any job opportunities and had not requisitioned any help through the hiring hall. (R. 31-32). The Trial Examiner made recitals of evidence, however, that during this same period other employers, not affiliated with the AGC-Chapters, not covered by the hiring hall clause, not engaged in commerce, and not within the issue had requisitioned help, (R. 16, 33), and that Lewis was not given a job or jobs during that period because of a practice of the union to favor members over non-members. The Trial Examiner made further recitals that on May 9, 1956 at the Nielsen housewrecking job at the Teamsters Union Hall (R. 138, SR. 216) that Buchanan, union

agent, had threatened Nielsen with a picket line if he employed non-union help, but that Lewis nevertheless performed all of the work that was available. (R. 17-18). As to the Todd Shipyard job, the Trial Examiner said that he discredited[3] Allman's testimony * that this job required a man of much smaller dimensions than Lewis, (R. 31, No. 14) but did not recite that Lewis was discriminated against. From these recitals, the Trial Examiner states (R. 33) that they will not support a finding that any members of the AGC-Chapters, or that any other employer, discriminated against Lewis as the complaint alleges. The Board repeats these recitals (except the Todd job) but nevertheless states "it is unnecessary to determine whether there is sufficient evidence . . . . to support the allegation of discriminatory practices in hiring." (S. R. 197). Footnote No. 3 ,which will become famous in this case, does not reverse the Trial Examiner because it "concludes" that employers, other than AGC members, requisitioned employees. Because of ambiguity, because of the mis-interpretation given by the General

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[3] While the Trial Examiner devoted a full page (R. 19) and a half-page footnote (R. 32 #14) to the Todd episode, and states that he discredited the testimony of Allman, he does not conclude that Lewis was discriminated against (R. 33). Further he states that he must disregard this episode (R. 31 and footnote #13). However, the Trial Examiner probably relies upon the Todd requisition as evidence that calls were being made for men. This pertinency is trivial because the crucial period of rejection of Lewis' applications ends on the preceding day since Lewis was in fact dispatched on May 17th. In fact, the crucial period ends on May 14 because on that date commenced the facts of inducing Lewis to drop the charges. From the events since May 14th, the Trial Examiner, the Board, and for that matter the General Counsel, have not found nor argued that these also show a general discriminatory policy toward Lewis. The Board never mentioned the Todd episode probably for the reason that they could not give it any effect. We believe that the attempt of the General Counsel must fail for the same reason.

Counsel to this statement, and because it does not meet the standards of this Court for explicitness, as well as not supported by substantial evidence, we have taken exception.

The Labor Agreement was executed by the AGC-Chapters and the District Council, and not by Local 242 as erroneously found by the Board and as urged by the General Counsel. None of the Chapters ever deal with any of the Unions. The only dealings the Chapters have with the District Council is in the negotiation and execution of the agreement, and in the second stage of the grievance procedure. Grievances are first handled by the local union and the contractor. If they can't settle it, it goes to the District Council and the Chapter. The Local Unions do not participate in negotiations of the contract. Jobs are requisitioned by contractors directly to the local union. The Chapters and the District Council have nothing to do with the enforcement, administration or implementation of the hiring hall provisions. (R. 79, 92, 96, 97, 99).

When Lewis appeared at the hall for a job on May 14, 1956, the Union had just received a copy of the charges filed by him a few days prior thereto, and they ordered him out of the hall. Lewis returned on May 17, 1956. This was the first time, according to the testimony of Lewis when there were any jobs at the hall. Lewis was not first dispatched, but after a call was made by a representative of the Board, Lewis was dispatched that day. From that day on, Lewis was given work regularly and there is no complaint of discrimination. However, from that date on the Trial Examiner and the Board have found that Lewis was induced to drop the charges. These findings are supported by substantial evidence and we are precluded from urging any ob-

jection for lack of exceptions. The Trial Examiner and the Board have made no findings that any of the transactions occurring subsequent to May 17, 1956 (and possibly subsequent to May 14, 1956) are any evidence of a discriminatory policy. We do not understand the General Counsel to urge otherwise. (R. 15, 125-6, 215).

D. Summary of the Intermediate Report.

A convenient abstract of the Trial Examiner's Report is set out in Appendix No. 2, p. 3A. A reading of these appendices is not necessary to a full understanding of this brief.

E. Summary of the Board's Decision and Order, and Opinion.

Set out in Appendix No. 3, page 7A.

F. Summary of Murdock's Opinion.

Set out in Appendix No. 4, page 13A.

G. Rationale of Murdock's Opinion.

Set out in Appendix No. 5, page 17A.

H. Footnote No. 3, S. R. p. 197.

The Board's footnote No. 3 is set-out verbatim:

"The Union admitted that in doing the hiring for the employers it always hires its members in preference to non-members, and that whenever a member it not immediately available, it attempts to locate one, and only failing in the search does it ever refer a non-union member to any assignment. If the contract were not unlawful on its face, we would deem the record as a whole ample to support a factual inference that the Employers in fact hired hod carriers and common laborers through this union hall

and that the Respondents in fact hired such employees on behalf of the contractors in the closed-shop manner which the Union admitted."

(a) *Preferential Hiring Practices.*

The first sentence is practically a verbatim quote from the Trial Examiner's recitals:

"I have no doubt that Allman repeatedly applied this policy (to prefer union members over non-union men) to Lewis prior to the latter's dispatch on May 17, and referred union members to jobs in preference to Lewis because the latter was not a member of Local 242." (R. 33-34);

"Local 242 has had occasion to dispatch hod carriers who are not members of the organization, but the practice has been to do so only on occasions when no members are available for dispatch." (R. 15).

The Trial Examiner made other recitals of discriminatory conduct during the period in question (R. 16-18; 31-33), all of which the Board was mindful of because they repeated the same recitals (except the Todd Shipyard episode) "As the Intermedicate sets forth . . ." (S. R. 206-207). The Board has not stated anywhere that they disagree with the Trial Examiner that "Despite the discriminatory treatment accorded Lewis by Local 242, the record will not support a finding that any members of the AGC-Chapters (or, for that matter, any other employer) discriminated 'with respect to the hire of Lewis,' as the complaint alleges and that Local 242 caused such discrimination, within the meaning of the Act." (R. 33).

The Board states that it is unnecessary for its decision to "determine whether there is sufficient evidence apart from the contract to support the alle-

gation of discriminatory practices in hiring." (S. R. 197). The Board further states that if the record showed requisitions from the AGC-affiliates on the dates that Lewis applied for jobs, such evidence would be immaterial (S. R. 207):

> "It is equally immaterial that there is no evidence now before us that on the particular days when he was rejected there were job openings with the Respondent employers, or current requests for referrals in the hands of the union officials pursuant to the contract."

(b) ***Contractors Other Than the AGC-affiliates Hired Employees and the Union Applied its Discriminatory practices as to Them.*** *

The second sentence of the footnote refers to a situation involving significant implications. The whole Brief of the General Counsel is premised upon it. The General Counsel repeated, as did the Trial Examiner and the Board, the recitals of discriminatory conduct by Local 242. Neither the Trial Examiner (R. 33) nor the Board (S. R. 197) could use these recitals to form findings of discriminatory conduct.[4] However, the General Counsel used them as the basis for his non-administrative finding of discriminatory conduct under the issues, under the contract, as to the AGC-affiliates. The General Counsel states "Finally, preference for union members was in fact practiced in Local 242's hiring hall." (GC-Br. 36): "These circumstances amply support the conclusion that the discriminatory treatment of Lewis was attributable to his non-membership in

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[4] The Board stated (footnote No. 7, SR. 201):

> "It is not necessary, as the Respondents apparently contend, that any discrimination provided for in the contract must be shown in fact to have occurred before the agreement itself be declared unlawful."

Local 242." The General Counsel asserts (GC-Br. 5):

> ". . . respondent Chapter (affiliates) had frequent occasion to use the services of Local 242's hiring hall in this manner during the events in this case" and such affiliates did "submit requests for employee' to such hiring hall."

The basis of this quote is the footnote No. 3. The General Counsel has overlooked the specific finding of the Trial Examiner to the contrary (R. 33-34).

This footnote cannot refer to the AGC-contractors without being inconsistent with the Board's statement (S. R. 207):

> "It is equally immaterial that *there is no evidence* now before us that on the particular days when he was rejected *there were job openings with the Respondent employers, or current requests for referrals in the hands of the union officials pursuant to the contract.*" (emphasis added).

Further, it is clear that the reference to employers in the footnote refers to employers other than the AGC-affiliates. In the Opinion there were eight references to the AGC-contractors. They were specifically described as "AGC contracting companies (SR 198), as the "employers here" (SR 200), as "Employer Respondents" (SR 206), and as Respondent Employers" (SR 205; three times on p. 207, and p. 208).

In any event, if the Board was reversing the Trial Examiner it was incumbent on it, under the authority of *Universal Camera Corp. v. NLRB,* 340 U. S. 474, 95 L. Ed. 456, 71 S. Ct. 456, to name the witnesses it believed, and recite the testimony it relied upon, otherwise in the event of conflict the Trial Examiner's findings would prevail over the Board's

for the Supreme Court therein stated (p. 490) in effect that the Trial Examiner's findings is part of the record under the Taft-Hartley Act which provides in Sec. 10 (e) that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Likewise under the Administrative Procedure Act. 5 U. S. C. A. Sec. 1007 (b) which provides: "All decisions (including initial, recommended or tentative) shall become a part of the record . . . . "

The Court reviewed the legislative history and concluded that "enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform."

The court concluded that evidence supporting a conclusion of the trial examiner is more substantial, than when it doesn't, stating at p. 496:

> "We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."

This court followed the rule of *Universal Camera* recently in *NLRB v. Englander Co.,* CA-9, October 10, 1958, 42 LRRM 2841, 260 Fed 2d 67.

In *Kelly v. Everglades Drainage District,* 319 U. S. 415, 87 L. Ed. 1485, the United States Supreme Court held at p. 420:

> "To support such determinations, there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicated."

In *Baltimore & Ohio Railroad Co. v. U. S.* CA-3, 1953, 201 F. 2d 795, the court likened the provision of the *Administrative Procedure Act* (5 U. S. C. A. 1007) to the *Federal Rules of Civil Procedure* (29 U. S. C. A. Rule 52 (a)) which provide:

> "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon"

and stated at p. 800:

> ". . . if we are to do what we are required to do in the way of reviewing the action of an administrative agency, we must have some help in learning from that agency what is interesting discussion of the testimony of witnesses in a given case and what the agency concludes from that testimony. This report fails to give it and, therefore will have to be sent back to the Board for appropriate findings of fact."

Here it would be futile to send the case back to the Board for appropriate findings because the Trial Examiner said there was no evidence on which to make credible findings (R. 33-34).

United States v. Forness, (CA-2, 1942) 125 F. 2d 928 held that explicit findings of fact not only enable the appellate courts to more conveniently review decisions of trial courts but they also serve the important purpose of evoking care on the part of the trial judges in ascertaining the facts. Also see Barron & Holtzoff, *Federal Practice and Procedure,* Section 1121, and cases cited therein.

In *Irish v. United States,* (CA-9, 1955) 225 F. 2d 3, this court had a case arising under the Federal Tort Claims Act, in which the trial court had failed to make specific findings on the issue of negligence. The findings did not reveal which witnesses the trial

court believed or which facts were accepted as true. This court remanded the case to the trial court for entry of appropriate findings holding:

> "Findings of fact are required under Rule 52 (a) *Federal Rules of Civil Procedure,* 29 U. S. C. A. The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision (citing cases)."
>
> "The findings in this case provide no such understanding and give no hint as to the factual basis for the ultimate conclusion."

Since the position of the General Counsel is (GC-Br. 5) that the footnote finding reverses the Trial Examiner (R. 33-34), it is too general for such purposes.

Further, the Board would have to rely upon substantial evidence showing that the AGC-affiliates were requisitioning from the pool at the crucial times. In *Consolidated Edison Co. v. NLRB,* 1938, 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206, the United States Supreme Court said at p. 229:

> ". . . substantial evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences."

In *NLRB v. Thompson Products,* CA-6, 1938, 97 F. 2d 13, at page 15, the court added:

> Substantial evidence ". . . means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and considering them in their

> entirety and relation to each other, arrives at a fixed conviction."
>
> "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power."

In *Ballston-Stillwater Knitting Co. v. NLRB,* CA-2, 1938, 98 F 2d 758 at p. 760 the court stated after quoting Sec. 10 (e) of the Taft-Hartley Act, that it is not

> "bound to accept findings based on evidence which merely creates a suspicion or gives rise to an inference that cannot reasonably be accepted."

The Agency must not only find the ultimate facts according to *Public Utilities Commission v. F. P. C.* (CA-3, 1953), 205 F. 2d 116, 119, but also

> "It is also settled that an administrative order must contain express findings of the basic facts upon which the expressed, ultimate fact must be supported. *United States v. Caroline Freight Carriers Corp.,* 1942, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971. 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *United States v. Chicago, M. etc. RR.,* 1935, 294 U. S. 499, 511, 55 St. Ct. 462, 467, 79 L. Ed. 1023."

We therefore conclude that if the footnote gives any support to the General Counsel (GC-Br. 5), it must be on the basis that it reverses the Trial Examiner. As a reversal it must fail, so the General Counsel is left without support.

II.

SPECIFICATION OF ERRORS
and
STATEMENT OF THE ISSUES

A. The Trial Examiner and the Board Erred in Holding and Finding, to-wit:

1. ***The Board in holding that the hiring hall clause was per se illegal as a matter of law.***
(R. 45, SR. 197);

2. ***The Board in holding that ANY implementation of the hiring hall clause was illegal as a matter of law.***
(R. 46; SR. 205-206);

3. ***The Board in holding that there was implementation of the hiring hall clause by the "continuous rejections of Lewis' applications for work" as a matter of fact.***
(R. 46-47; SR. 205-206; also see SR. 207, where Board states that the contract was not implemented);

4. ***The Board in holding that Lewis should be allowed back wages.***
(R. 46-47, 48; SR. 208);

5. ***The Board in prescribing criteria to be included in the labor agreement and for posting.***
(SR. 202-203);

6. ***The finding by the Board that Local 242 violated the Act by "executing" the Agreement.***
(R. 45 and footnote No. 1; SR. 205 and footnote No. 11);

7. ***(If SR. 197, foonote No. 3 can so be interpreted:) The finding by the Board that AGC-affiliates requi-***

sitioned help; that Local 242 had a disctriminatory policy of favoring members; and applied that policy to the said requisitions.

8. *(If their recitals of such evidence constitutes findings of fact within the issues:) The Findings by the Trial Examiner and the Board that Local 242 had a discriminatory policy of favoring members; that employers (not affiliated with the AGC) requisitioned help; and that Local 242 applied that policy to said requisitions.*

B. The Issues Presented by the Board's Petition for Enforcement:

1. *Is the Hiring Hall Clause per se Illegal?* (R. 45, SR. 197);

2. *Will Any Implementation*[5] *of a per se Illegal Hiring Hall Clause Be Illegal?*

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[5]We have used, and we believe that the Trial Examiner and the Board have used the terms "implementation, enforcement and administration" synonymously. This is to be distinguished from the terms "execution and maintenance," with the latter term referring to publication of the agreement to employees and prospective employees. These terms have been used thus in the leading cases of:

Monolith Portland Cement Company, 1951, 94 NLRB 1358, 1363;

Port Chester Electrical Construction Corp., 1951, 97 NLRB 354, 355;

County Electric Co., Inc., 1956, 116 NLRB 1080, 1081.

On the other hand, the General Counsel has intermingled the terms with confusion. For instance, the General Counsel undoubtedly uses the word "maintenance" to mean "implementation, enforcement and administration" in the following statement (GS-Br. 12):

> "Finally, *preference for union members was in fact practiced* in Local 242's hiring hall. From all of these circumstances, encouragement of union membership, at least in the sense of encouraging adherence to union rules and support of union activities could reasonably be inferred from the *maintenance* by respondents of their hiring agreement." (Emphasis added.)

While the Board and the General Counsel have avoided

(R. 46, SR. 205-206; see SR. 207, where Board states contract was not implemented). In other words, will *any* rejection of any applicant for work, even for reasons otherwise legal, be nevertheless unlawful when done pursuant to a *per se* unlawful hiring hall clause?

3. (a) ***Should Lewis Be Allowed Back Wages Under the Issues?***

   (b) ***Assuming that there was a requisition from an AGC-contractor under the hiring hall clause, and that Local 242 rejected Lewis' application not pursuant to any discriminatory practice of the union to prefer union members, should back pay be given Lewis?***

4. ***Should the District Council be liable for back pay to Lewis under 3 (a), and under 3 (b)?***

5. ***Should the AGC-Chapters be liable for back pay to Lewis under 3 (a), and under 3 (b)?***

III.

SUMMARY OF RESPONDENTS' ANSWER TO ISSUES PRESENTED BY GENERAL COUNSEL

The General Counsel set up his brief with separate discussions of the discrimination violations and the coerce-restrain violations, first as a preliminary Summary of Argument (GC-Br. 11), then in full-dress Argument (GC-Br. 17 and 31). He thus had four opportunities to present the Board's *per se* views of the hiring hall clause, and similar

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the use of the term **per se**, we believe the term is fairly descriptive of the Board's position. The **Trial Examiner** used the term four times to describe the General Counsel's position and Murdock used it twice. This court used the term in the **Swinerton** case and the Board has used the term often.

opportunities to present the Board's view that *any* implementation of the unlawful contract was illegal. Similarly with respect to Lewis' back pay. However, only once did he mention these issues, and that was in respect to the *per se* illegality of the hiring hall clause (GC-Br. 11-12) in his preliminary Summary of Argument. However, he colored it with the circumstances of how it would be considered by a reasonable man, then he abandoned both by posing the hiring hall clause with a non-administrative finding of fact "Finally, preference for union members was in fact practiced in Local's hiring hall.", and "from all these circumstances". (GC-Br. 12). Nowhere did he pose the Board's implementation views, nor the basis for back pay to Lewis.

The General Counsel is on three horns of a dilemma:

(1) The *per se* Aspects of the "clause, implementation and Lewis."

The *per se* unlawful clause, *any* implementation thereof in a manner not otherwise illegal, and the "continuous rejections of Lewis' applications" not pursuant to any discriminatory policy were the issues, and the only issues posed by the Board and the Trial Examiner.

Up to this time, all board decisions and court decisions treated *prima facie* legal exclusive hiring hall clauses, not as *per se* illegal, but as legal unless the practice or implementation was illegal because of discrimination. That this has been the Congressional intent has never been questioned, and is in fact conceded in this case by the Board (S. R. 201-202, footnotes No. 8 and No. 9; Murdock's separate

Opinion, R. 59, 60) and by the General Counsel (GC-Br. 12, 15, 21)[6].

Starting with the premise that exclusive hiring hall clauses, which contain no phrases proscribed by statute, are legal, the General Counsel was confronted with the insurmountable hurdle of arguing that you can draw therefrom unlawful inferences. It is easy to understand why the General Counsel did not present the Board's views of the contract. The General Counsel had two additional choices, which we now explore.

(2) The Per se "clause, implementation and Lewis" As Viewed by a Reasonable Man.

The General Counsel in analyzing the coerce-restrain and the discrimination violations posed these subjects thus:

> "Such unlawful restraint is established in this case by the showing that job applicants could *reasonably feel* that employment opportunities depended on their good standing with Local 242." (GC-Br. 13);
>
> "All that is required to sustain the Board's Sec. 8 (a) (1) and (b) (1) (A) findings is that the hiring agreement in this case had the effect of restraining employees in their right to 'refrain' from assisting unions or engaging in union activities." (GC-Br. 32);
>
> "The short of the matter is . . . that applicants could *reasonably feel* that their employment de-

[6] Thus, the General Counsel states:

"The Board has made clear, however, that its conclusion in this case does not rest on the assumption that hiring hall agreements are inherently unlawful (p. 12);

"Hiring halls can perform their useful and permissible function of providing an efficient and fair method for the recruitment of personnel without having a discriminatory or coercive effect on the employees who must utilize such halls in order to find employment." (P. 15.)

> pended on their good standing with Local 242." (p. 33);
>
> "Moreover, as employees well know, hiring halls traditionally have been operated primarily for the benefit of union members, and . . . employees may be expected to *assume* that such an arrangement is intended to operate in that fashion." (p. 12);
>
> "From all of these circumstances, encouragement of union membership . . . could reasonably be inferred from the maintenance by respondents of their hiring agreement." (p. 12); (emphasis added)

in the framework of the reasonable man. However, before he left this premise at the door of this court, he abandoned it every time by injecting the non-administrative findings of discriminatory practices by Local 242 applied to Lewis under the issues of this case. This opportunity was lost as a dilemma. It is well for us to analyze the difficulties with this position.

Up to now an exclusive hiring hall clause was not held illegal by the Board unless it contained phraseology proscribed by the Act. And, an exclusive hiring hall practice was not illegal unless there was conduct violative of the Act, consisting of actually removing an employee from the job or denying a prospective employee a job. All exclusive hiring hall clauses and practices were viewed illegal only under the discrimination provisions Sec. 8 (a) (3) and 8 (b) (2), and derivitively, but not independently, violative of the coerce-restrain provisions, Sec. 8 (a) (1) and 8 (b) (1) (A). We repeat the essential legal components, a proscribed clause or a proscribed practice, from which the inference could then be made of unlawful "encouragement to membership" or "discouragement," for a discrimination

violation. The General Counsel, could not start off with the assumption that the clause was illegal on its face because that would be arguing in a circle. He was likewise embarrassed with the prospect of the premise of actual discrimination of an employee by removing him from the job or preventing him from getting the job, since there was no finding of any job requisitions from the AGC-affiliates (under the issues, only the AGC-affiliates are involved). We shall see in the next sub-title that he made a non-administrative finding on this. Under all court decisions, and all prior board decisions, you had to start from either proscribed clauses or proscribed practices, before you could draw illegal inferences of discrimination.[7] Therefore, in this vacuum he set his reasonable man, but could find nothing for him to sit-on, so he abandoned him for the more fruitable prospect of framing the issues based on non-administrative findings.

(3) The "Contract, Implementation and Lewis" Supported by a Non-Administrative finding of actual discriminatory practices.

The Congressional intent was, and all Board holdings and all Court decisions up to now have posed

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[7]This court in NLRB v. Reed (CA-9), 206 F. 2d 184, relied upon NLRB v. Teamsters Union, 196 F. 2d 1 (AA-8) in holding that not only must discrimination be proved, but "encouragement to membership" must be proved as an independent fact. In that case Charlton was an old-time member of the union who had been pulled off of the job while in good standing because he didn't have a permit, and this court held that he was not "encouraged to membership" because he would not be influenced subjectively. The *Teamsters* case was one of three cases consolidated *sub nom* Radio Officers Union v. NLRB, 347 U. S. 17, in which the United States Supreme Court held that where the discrimination is proved you infer "encouragement" or "discouragement." We thus view the *Reed* case in the light of *Radio Officers*. This specific problem is not involved here.

the legality of exclusive hiring halls as a question of fact. This is certainly the best of the three theoretical choices available to the General Counsel and this is the basis on which he posed the "contract, implementation and Lewis" when he reached his concluding statement.

This was no less, however, a dilemma to the General Counsel because the Board had not given him any findings of fact to which he could anchor his argument. The General Counsel then made non-administrative findings of fact:

(1) "... 242 maintains ... a hiring hall to which the employer members of the respondent chapters submit requests for employees when job openings occur ... The Employer members of each of the respondent Chapters had frequent occasion to use the services of Local 242's hiring hall in this manner during the events of this case." (GC-Br. 5);

(2) that the union enforced the contract in a discriminatory manner when he stated "Finally, preference for union members was in fact practiced in Local 242's hiring hall." (GC-Br. 12);

"Under these provisions, neither discrimination in hiring nor encouragement of union membership need be shown; it is enough, that enforcement of the agreement has the effect of restraining employees in their right to refrain from union activities." (GC-Br. 13);

"Finally, it should not be overlooked that, notwithstanding the noncommittal language of the contract between respondents, Local 242 in fact followed the practice of favoring union members in making job referrals (supra, p. 6)." (GC-Br. 27 and the footnote No. 20);

"Such a practice is clearly violative of the Act, irrespective of the presence of nondiscriminatory contract language. . . . In view of its more comprehensive holding respecting the hiring agreement in this case, however, the Board did not base its unfair labor practice findings or its remedial order on the discriminatory practices generally, apart from its finding and order respecting Lewis (R. 45-51, S. R. 197)."

(3) "Wholly apart from the hiring agreement, moreover, the evidence shows that the reason Lewis was not referred to jobs was that he had been dropped from membership in Local 242, a reason specifically made an improper basis for discrimination by the statutory provisions . . . Finally, openly disclosing that Lewis' lack of membership made him unacceptable to Local 242 and ineligible for referral, Local 242's business agent threatened to picket a contractor with whom Lewis obtained employment because the contractor, by hiring Lewis, had not kept 'straight union men on the job'." (GC-Br. 35-36).[8]

Having thus fortified himself with tailor-made issues and concocted findings of fact, the General Council then addressed himself to the problems of the law. We have difficulty in reconciling the holdings of the cases the General Counsel cites with the

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[8]This is the second presentation of the Lewis rejections—as based on a discriminatory practice, which was not within the issues. The first presentation was also on the basis of a discriminatory practice of denying him his rank under a "job rotation plan" (CC-Br. 35), likewise not within the issues. Lewis was not presented as "implementation" of the unlawful contract in the manner in which the Board found the violation to have occurred (R. 46; S. R. 205-206), probably for the reason that the General Counsel realized that the Board had misinterpreted its finding (footnote #3, SR. 197) and thus had no finding on which to base the violation.

principles he says they stand for. Further, we watch with interest his efforts to get this court to abandon its holding in *NLRB v. Swinerton,* CA-9, 202 F. 2d 511, certiorari denied 346 U. S. 814.[9]

IV.

ANSWER TO "BRIEF OF THE NATIONAL LABOR RELATIONS BOARD"

A. Answer to "Statement Of The Case".

We accept the General Counsel's statement of what the Board held. However, the Board made no findings of fact of discriminatory practices by Local 242 in the "continuous rejection of Lewis' applications for jobs." (GC-Br. 2-3).

B. Answer to "I. The Board's Findings of Fact."

(GC-Br. 3).

We would modify the General Counsel's statements in these respects. The AGC-Chapters bargain and execute agreements only with the District Council, and not with the Local Unions. Local 242 never negotiates with nor handles grievances with any Chapter. The Mountain Pacific Chapter's affiliates do not hire persons of the same skills, nor to perform the same type of work as performed by members of Local 242. Local 242 dispatches men from the hiring hall, upon requisitions from affiliates of the Seattle Chapter, and occasionally when a Tacoma Chapter affiliate has a job in the Seattle area, but never to affiliates of Mountain Pacific Chapter.

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[9] In addressing itself to this task undoubtedly this court will be mindful of its considered opinions in the later cases by this court of NLRB v. Thomas Rigging Co., CA-9, 211 F. 2d 153, certiorari denied, 348 U. S. 871 and NLRB v. ILWU Local 10, F. 2d 778, 781; as well as cases of the other Courts of Appeal following this rule.

The District Council has nothing to do with dispatching, and has no dealings with the contractors.

The Board did not, nor did the Trial Examiner make any finding as stated by the General Counsel (GC-Br. 5) that the affiliates requisitioned from the Local 242 hiring hall. The recitals by the General Counsel of a practice by Local 242 to prefer members, of Lewis' continuous applications for work from March 15, 1956 until May 14, 1956 and of the rejections, including the Nielsen episode and the Todd Shipyard episode, are not the basis of any findings of fact by either the Trial Examiner or the Board that the alleged discriminatory policy of the union was applied to the AGC-affiliates under the issue of the case. The Complaint did not allege that Lewis was discriminated against generally, but only under the hiring hall agreement with the AGC, and consequently Lewis could not be a vehicle for the implementation of this hiring hall agreement unless the AGC-affiliates had requisitioned help.

Commencing with May 14, 1956, we do not question that the findings show that Local 242 induced Lewis to drop the charges and that such findings are supported by substantial evidence. However, the Trial Examiner and the Board did not make any findings that this conduct was also evidence of a general discriminatory policy of the Union as to Lewis, and the General Counsel nowhere so contends.

C. Answer to "II. The Board's Conclusions and Order".

The Board found the AGC-Chapters had violated Section 8 (a) (3) as to which the Complaint did not allege or claim a violation. (R. 23, footnote No. 9; this brief p. 2 and footnote No. 2).

We do not think that the Board posed the exclusive hiring hall clause in a setting of the "circumstances of this case", but posed it solely *per se* as a conclusive presumption which does not require proof and which precludes proof (S. R. 197).

It is true that "In addition, the Board unanimously concluded that Local 242 had unlawfully refused to refer Lewis to jobs." but these were jobs of other employers, not covered by the hiring hall agreement, not affiliates of the AGC-Chapters and not within the issues of this case (see supra 15). (GC-Br. 10). We should point out in this connection that the Board found the "implementation of the unlawful contract in the rejection of Lewis' continuous applications for employment was unfair labor practice" (R. 46; SR. 205-206) by a mis-interpretation of its own finding (footnote No. 3; see this brief pp. 5-6, 15, 18, 71-74). This holding is on the basis that *any* implementation was illegal. Member Murdock likewise mis-interpreted the facts. (See Appendix No. 5, pp. 17A-20-A).

D. Answer to "Summary of Argument".

(GC-Br. 11)

This is the only place in the General Counsel's brief where he poses a *per se* issue, which he colors with a "reasonable man's" assumptions, then abandons them with a non-administrative discriminatory practice, and concludes that "from all these circumstances" encouragement "could reasonably be inferred from the maintenance . . . of the hiring agreement."[10]

He contends that the coerce-restrain violation was found independently by the Board which is in-

[10]By maintenance, he means "enforcement, implementation and administration."

correct. However, this suggests a fatal defect in the Board's holding that the AGC-Chapters violated the coerce-restrain provisions. Although the Board found the Chapters had violated the discrimination provisions, this must fall because they were not so charged in the complaint. Therefore, the derivitive finding must fall.

As to the discrimination against Lewis, the General Counsel correctly states in "(1)" that the Board's conclusion is based on "the fact (*sic*) that Lewis was denied job referrals pursuant to an unlawful agreement", but in this statement the General Counsel falls into the same error as the Board and member Murdock, because this is a conclusion based on a mis-interpretation of footnote No. 3, SR 197 (S. R. 207). The General Counsel's "(2)" falls because there are no findings on which to base it, and if such findings were made they would be outside the issues of the Complaint.

E. Answer to General Counsel's "Argument".

(GC-Br. 14)

The Congressional mode was to make the exclusive hiring hall agreement, which contained no proscribed language, a question of fact, clothing the Board with ample authority to punish the wicked. The Board's mode is to convict the unions and the employers alike when they embark upon negotiation of an exclusive hiring hall agreement, and make them prove their innocence at the time the agreement is executed by inserting so-called safeguards. This is not the English-law principle of judging only those accused of violation. It is the civil law procedure of not distinguishing the innocent from the guilty, and throwing the burden on the defendant to prove his innocence.

Where the Act has proscribed the wrong, namely, proscribed clauses or practices, then as to the remedy, the Board has wide latitude to "use . . . its judgment and its knowledge", but none of the cases give the Board the substantive law legislative power to "distinguish the licit from the illicit factors that inhere in union-operated hiring arrangements". For instance, the cited cases (GC-Br. 16) do not sustain the General Counsel. *NLRB v. Seven-Up Bottling Co.,* 344 U. S. 344, 348, 97 L. ed. 377, 73 S. Ct. 287 (1953) only involved the question whether the Board could apply its new policy of computing credits to back pay awards on a quarterly basis. At page 346, the Court stated: "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." In *Chicago, etc. Ry. Co. v. Babcock,* 204 U. S. 585, 598, 51 L. Ed. 636, 203-206 S. Ct. 595, a state board of equalization had valued the railroad property, and the court said that since there was no evidence of fraud or the use of wrong principles, it would not disturb its findings. Neither case was apposite.

F. Answer to "A. The hiring hall agreement (is) within the proscription of" the discrimination provisions of the Act.

(GC-Br. 17).

The correct tests are (1) a proscribed contract or practice, and (2) from which the inference of "encouragement" or "discouragement" can be drawn. It is not "settled law that the execution and maintenance of an exclusive hiring agreement . . . is violative" of the discrimination provisions. The cases cited (GC-Br. 17-18) are not apposite. In this court's *NLRB v. Shuck,* 1956, CA-9, 243 F. 2d 519, 521, cer-

tiorari denied, 348 U. S. 917, the agreement specifically provided for union preference, and Kieburtz was actually removed from the job in implementation of the unlawful agreement. In *NLRB v. Daboll,* CA-9, 1954, 216 F. 2d 143, 145, this court considered a proscribed agreement to hire only union plasterers, and found that Sells and Sinclair, members of the union, were denied employment because they couldn't get clearance from the union. In *NLRB v. Sterling Furniture Co.* (CA-9, 1953), 202 F. 2d 41, 42, the proscribed agreement required union membership, and Barnes was removed from the job because his work permit was revoked by the union. Enforcement was to (p. 45) "cease giving effect to the contract.' In *Red Star Express Lines v. NLRB,* (CA-2) 196 F. 2d 78, 81, a forbidden clause required the hiring of union members and Mullen was discharged at the request of the union for supporting a rival union. In *NLRB v. Philadelphia Iron Works, Inc.* (CA-3, 1954), 211 F. 2d 937, 941, the agreement required the hiring of union members with a referral slip. Fink, a union member, secured a job and asked for a referral slip which was refused because he was not at the top of a rotation list. The union told the company not to hire him. Enforcement enjoined discrimination under the agreement (p. 943).

If the agreement is not violative of the Act on its face, then there is no violation in the absence of discriminatory practices.

The General Counsel errs in asserting that an exclusive hiring hall clause unlawfully "encourages union membership" and that there is no need to have a showing of discriminatory practices in order to have unlawful conduct. The cited cases are not apposite (GC-Br. 18). In *NLRB v. International Union of Boilermakers* (CA-3, 1955), 218 F. 2d 299,

302-303, there was a proscribed preferential clause pertaining to extra work which required employees in good standing with union books. Three persons were discriminated against because they did not have union books. In *NLRB v. McGraw & Co.,* (CA-6, 1953), 206 F. 2d. 635, 641, there was a proscribed closed shop agreement. There are cases where application for employment is a "futile gesture" and is not required in order to show a violation. These fall into two classes. Where the agreement is proscribed. Where a practice is established by independent evidence of discrimination, which comes to the attention of the prospective employees, they are not then required to make formal application. All of the General Counsel's cases fall into one or both of these classes. None of them support his assertion that with a non-proscribed exclusive hiring hall clause, there can be a violation of the Act without actual practices of discrimination. The reason is simple. Such a clause is not illegal. The cited cases are not apposite.

In *NLRB v. Waterfront Employers,* (CA-9, 1954), 211 F. 2d 946, 952, there was an admitted illegal hiring hall agreement. Two members of the union, Crum and Purnell were discriminated against because of the non-payment within 30 days of fines of $2400 imposed for not standing their share of picket duty. Purnell did not work during a 30-day grace period because of arthritis, but during this period on two separate occasions he asked the union dispatcher for a statement of availability for unemployment compensation benefits, and was twice refused with the statement that he only had 30 days to work unless he paid the fine. On the last occasion, he was told that "his time was up," and could no longer work unless the fine was paid. The dispatcher

testified that if Purnell had showed-up at the hall for work he would nevertheless have been permitted to work. At page 953, this court excused the application for work with this statement "The Board concluded, and we agree, that under these circumstances the futile gesture of applying for dispatch was not a prerequisite to a finding of discrimination."

This court had other evidence of the practice in the experience of Crum who worked during the 30-day grace period, up to the last few days when his gang was laid off. Crum phoned for a new dispatch and was told (p. 950): "Crum, there is no need of your calling up any more. There is a bug behind your name, and you won't be dispatched with your gang until the fine is paid." Crum contacted shipping companies who told him that he would be hired if he was dispatched by the hiring hall.

In this court's *NLRB v. Swinerton* (CA-9, 1953), 202 F. 2d 511, 515, certiorari denied, 346 U. S. 814, the written contract provided that there was "no limitation on the employer as to whom he shall employ," but the contract was misunderstood by the foremen who did the hiring. Swinerton's foreman told the machinists' agent and told the individual machinists applicants that Swinerton's contractual relations required that Swinerton "use only millwrights on the job", and Burns' foreman told them that "Burns' labor contract required them to hire millwrights with Millwright clearance" (p. 513). Work was imminent when these applications were made, and after the job commenced two more machinists applied at the Swinerton job inquiring for work for machinists, and the foreman responded with a "big wink", saying, "I'm wise to you guys." Only two of the six applicants visited the mill-

wrights' office inquiring for work permits and they were told that no permits were issued and that they would have to take an examination and pay $50 (p. 514). This court found the existence "of such discriminatory hiring policy is amply supported by evidence" and that "further application for employment would be futile, the job applicants need not go through the useless procedure of reapplying for employment at a later time when jobs are actually available in order to establish that they were victims of the discriminatory hiring policy." (p. 515). The jobs were imminent at the time of application.

In *NLRB v. Local* 420, *U. A.,* (CA-3, 1956), 239 F. 2d 327, the agreement provided that the firm would employ only members in good standing (p. 329). The hiring foreman was a member of the union who had been told at union meetings on many occasions that he could hire and retain only members in good standing (p. 330). A number of permittees had been granted weekly permits which were not renewed on the end of the week in question. On the following Monday, they went to the union to try to get permits. They had previously been told "Don't lose these permits because if you lose this permit, you are out of business . . . You cannot work without these . . . If you don't get permits, don't come back to work." (p. 330). The defense was that the employees should have reported to work on Monday instead of going to the union, where they were denied renewals. The Court stated, "Neither law nor common sense requires them to make a token appearance to preserve legal rights." (p. 331).

In *NLRB v. Lummus Co.* (CA-5, 1954), 210 F. 2d 377, although the company was not affiliated with the AGC, it followed the AGC closed-shop exclusive union hiring agreement. The Company told appli-

cants Reneau and Tucker on May 31 and June 1 that they had to get referrals from the Carpenters, take a test and pay $100. On June 5, the company hired three union carpenters. It was thus evident that the company required compliance with a union proscribed practice. It was not necessary for the men to apply at the union for referrals. As we have already pointed out, in *NLRB v. Shuck,* (CA-9, 1953), 243 F. 2d 519, 521, there was a proscribed clause and Kieburtz was discharged because of lack of membership. The foreman told him (p. 521): "We have to go along with the union on this, or they can make trouble for us."

Every case cited by the General Counsel established the principle that where the contract is proscribed, a discriminatory discharge or refusal to employ is violative of the discrimination provision. None of the cases held that an exclusive hiring hall clause was violative of the Act. (GC-Br. 19).

The General Counsel finds this court's considered holding in *NLRB v. Swinerton, supra,* inconsistent with his contentions and asks this court to modify its holding therein, in particular:

> (p. 514) "The Board has contended that adoption of a system of union referral or clearance also violates the Act absent a 'guarantee that the union does not discriminate against the nonmembers in the issuance of referrals'."

This court then pointed out that that was not the position of the Board, nor a correct statement of the law. The General Counsel (GC-Br. 20) then seeks to get in compliance with *Swinerton* by assuming the "burden of proof", not to prove any physical facts of a discriminatory practice, but only "the sum of the circumstances attending the adoption and maintenance of a particular hiring hall . . . " Note

that he discreetly mentions execution and maintenance, which is the publication of the clause, and he carefully avoids the obligation of bearing the burden of proof as to "enforcement, implementation and administration." The only burden he will assume is to tell us that a "reasonable man" would feel in some meager uncertain way "encouragement." When the General Counsel told us of this before he talked about "enforcement" (GC-Br. 13) and that here "preference for union members was in fact practiced in Local 242's hiring hall." (GC-Br. 12). But he shows no inclination to assume the burden of showing these facts.

The General Counsel then abandons the whole basis of the Board's *per se* views of the "clause, implementation and Lewis" when he states (GC-Br. 21):

> "And, in counterpoint, nothing in the Board's decision suggests that a hiring hall must be found invalid where, on balance, no showing of unlawful encouragement can be made."

When the Board expressed its views on S. R. 197 and S. R. 207 as to the "clause, implementation and Lewis" it created a conclusive presumption that did not require proof and which precluded proof. In counterpart, the General Counsel states that proof of a legal practice will convert the "per se" illegal "clause, implementation and Lewis" into legality,

Radio Officers Union v. NLRB, 347 U. S. 17, cited GC-Br. 22, is not apposite. This is the first of three consolidated cases decided simultaneously. The closed shop agreement was signed prior to the effective date of the 1947 amendments to the Act and was thus legal. Fowler was a member of the union in good standing but had worked out of order, and the union required his discharge on the false pretext

that he was not in good standing. The court stated that if the legal closed shop agreement could be interpreted as a union preferential hiring clause, it would be preempted from the Act and would justify the discharge. The court held that the closed shop agreement was not a preferential hiring clause. In Radio Officers there was a discriminatory discharge in the absence of a hiring clause. Here we do not have any discriminatory conduct (under the findings and the issues) and an exclusive hiring clause patently legal. There is no similarity between the two cases.

Likewise the cited case of *NLRB v. Local* 542, *Operating Engineers,* (CA-3, 1958) 255 F. 2d 703, 42 LRRM 2181, is not apposite. The union had three classes of members "A", "B" and "C", with different wage scales and skills, and the union prevented three members from working outside of their "grades", and prevented a non-member from working. There was no agreement providing for these classifications, and the court held the conduct illegal stating (p. 2183): "This does not mean that the union may not administer referrals systematically in accordance with its rules or that a referral system is in its nature improper." Discrimination, not justified by a hiring clause, gives rise to the inference of unlawful "encouragement." Facts of discrimination are required before inferences can be drawn. Here there are no findings of discrimination under the issues; hence the General Counsel errs in drawing inferences.

The General Counsel again cites *NLRB v Waterfront Employers,* supra p. 35. (GC-Br. 25). In that case Crum and Purnell were actually discriminated against.

We now come to the footnote cases (GC-Br. 27).

Schuck and Swinerton have already been distinguished as involving proscribed agreements and proscribed practices, with actual discriminatory denial of employment. The first case cited is incorrectly named as "Operating Engineers." The correct title is *NLRB v. Local* 743, *United Brotherhood of Carpenters* (CA-9, 1953), 202 F. 2d 516. At p. 517 this court found that there was preferential agreement to use only carpenter members. In *NLRB v. Local* 420, *U. A.,* CA-3, 239 F 2d 327, we have already seen that the hiring foreman was a union member and required all employees to have union referrals. In all cases cited, there was a proscribed agreement and proscribed practices. In such cases, it is proper to infer "encouragement."

Again, footnote cases (GC-Br. 31) are distinguishable. In *NLRB v. Teamsters Union,* (CA-8, 1955) 225 F. 2d 343, the court stated p. 349:

> "In granting enforcement . . . we are allowing the union to be prohibited here from performing or giving effect in any way to the contract provision, not because of having made the contract provision but because of the abuse to which it has . . . put the provision . . . "

In *NLRB v. Dallas General Drivers Local* 745, 228 F. 2d 702, the court found an abusive use of the seniority clause and modified enforcement of the Board's order (p. 707):

> "We therefore approve the order to cease and desist from performing or giving affect to that portion of the contract which delegates to the respondent union authority to settle controversies relating to seniority. However, we cannot approve that portion of the order which seeks to prohibit the union from entering into or renewing any such agreement with any employer . . . "

By referring to the Board's case *sub nom* North East Texas Motor Lines, Inc., 109 NLRB 1147, at p. 1152, it is clear that the court did not strike down the agreement because the Court deleted from the Board's order, and notice, the following:

> "II. (a) Cease and desist from . . . .
>
> (2) Entering into or renewing any agreement with any employer which contains provisions delegating to the respondent authority to determine the seniority of employees or to settle controversies relating to seniority and enforcing such provisions . ."

G. Answer to "B. The hiring hall agreement is INDEPENDENTLY violative of" the coerce-restrain provisions.

(GC-Br. 31).

(1) *"Independent Violation" Issue Not Before This Court.*

The Board posed the coerce-restrain violation derivitively from the discrimination violation, and the Board made no independent findings of a coerce-restrain violation. The General Counsel has no authority to declare administrative policy, nor to ask the court to approve a non-administrative ruling. It was the intent of Congress that hiring clauses be handled as discriminatory violations on a question of fact. The Board has ventured on an uncharted sea on the discrimination issue, and showed no disposition to set a divergent course on a coerce-restrain issue. This court should dismiss this contention of the General Counsel summarily.

(2) *Theory Of The General Counsel.*

Without recognizing the right of the General Counsel to pose this point, we observe that he pre-

sents this argument on the basis of how a reasonable man would feel, thus:

> "Such unlawful restraint is established in this case by the showing that job applicants could *reasonably feel* that employment opportunities depended on their good standing with Local 242." (GC-Br. 13);
>
> "The short of the matter is . . . that applicants could *reasonably feel* that their employment depended on their good standing with Local 242." (GC-Br. 33). (Emphasis added).

It is to be noted that Sec. 8 (a) (1) contains the three words "interfere, coerce and restrain" while the Sec. 8 (b) (1) (A) provision omits "interfere." (See Appendix No. 1, page 1A). The legislative intent was that more should be required in the way of a factual showing as to union conduct, and that less need be shown as to employer conduct. Slight employer conduct could "interfere" with employees' Sec. 7 rights and thus they have more protection from employer conduct than they have from union conduct, because the union conduct must require more in the way of "coerce and restrain." Senator Taft likened it to "threat of force or threat of economic reprisal". The legislative intent was so construed in *Capital Service, Inc. v. NLRB,* (CA-9), 204 F. 2d 848, 347 U. S. 501. In that case one question was posed to this court, namely, whether the conduct of the union consisting of picketing and boycotting of the customers of a bakery firm restrained and coerced the employees of the bakery firm to join the union. The result of these sporadic activities was to cause curtailment of the production work of the bakery with consequent layoffs of the employees in question. The question of law was whether mere persuasion was violative, or whether the Act required more, such as a threat of economic reprisal. The

question was easily resolved by considering the legislative history (p. 853):

> "Senator Taft, in summing up the bill to the Senate on May 2, 1947 (stated):
>
> 'The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, Here are the rules of the game. You must cease and desist from *coercing and restraining* the employees who want to work from going to work and earning the money which they are entitled to earn. The Board may say, You can persuade *them* (that is, the employees, not the public); you can put up signs; you can conduct any form of propaganda you want to in order to persuade *them,* but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work. As I see it, that is the effect of the amendment. (Emphasis supplied by the court). Legislative History of the Labor Management Relations Act, 1947, vol. 2, p. 1206."

This court's footnote in that case is significant (p. 853 No. 4):

> 'The Senator apparently had changed his mind since a prior statement:
>
> 'Question: Suppose the union, instead of refusing to handle his goods in other plants which that union has organized, urges the general public not to buy products of non-union manufacturers?
>
> 'Answer: That is not forbidden by the Act, since it is merely persuasion.'
>
> "He had not then recognized that urging the public not to buy employee-made goods was not mere persuasion of employees but the threat of economic reprisal on the employees, by diminishing their employment through diminishing public buying."

This court then found facts of economic coercion (p. 853):

> "The evidence shows that all of the picketed stores did cease to sell the products manufactured by Service's employees. Here is more than an appeal to the *employees* to persuade *their* action. Here is successful economic coercion tending to prevent them from exercising their right to work, by diminishing the public consumption of the product of their work." (emphasis by court).

In *Capital Service* there were physical acts committed which created economic compulsion akin to "coerce and restrain" of a nature that clearly interfered with Sec. 7 rights. It was a lot more than the *de minimus* flowing from a patently legal hiring clause. It was a lot more than what the "employees reasonably feel."

None of the General Counsel's cases are apposite —none are hiring hall cases (GC-Br. 33-34, and footnotes). In *NLRB v. Reed,* (CA-9, 1953), 206 F. 2d 184, the employer had no union agreement but fired Charlton on the threat of the union to strike the job. Charlton was a 50-year union member who went to work without a union clearance. This court held (p. 189) that Charlton had a right to continue working and that his discharge was discriminatory in violation of the Act. In *NLRB v. Local* 1423 *Carpenters Union,* CA-5, 238 F. 2d, the union adopted unilaterally a rotation rule and compelled the employer to accede to it by threat of a strike, and the union likewise threatened strike action if any of the employees violated the rule. The court held that employees had the right to work without observing the rotation rule, and that the threats were violative of the Act. The case of *Truck Drivers Local* 449 *v. NLRB,* 353 U. S. 87, 96, was not at all pertinent to

any subject under scrutiny here. It held that the Board had the authority to prescribe multi-employer units in accordance with the congressional intent. In *NLRB v. Babcock & Wilcox Co.,* 351 U. S. 105, the court held that the rights of organizers to visit the plant were matters for administrative adjustment, but nevertheless scrutinized the Board's consideration and set it aside. In the consolidated cases of *NLRB v. United Steelworkers (Nu-tone, Inc.),* and *NLRB v. Avondale Mills,* (1958) 357 U. S. 357, 78 S. Ct. 1268, 2 L. ed. (2d) 383, the United States Supreme Court reviewed two cases involving administration of the Board's no-solicitation rule. The Courts of Appeal had reached different conclusions. The Court held that the Board's decision in both cases should be voided because of the lack of findings by the Board so as to enable the court to judge whether it had acted properly.

H. Answer to "II. Substantial evidence supports the Board's finding that Lewis was denied job referrals in violation of the" discrimination and coerce-restrain provisions of the Act.

The factual situation is confined within the period March 15, 1956 to May 14, 1956, because after that date the union's activities consisted of inducement to drop the charges. Subsequent to that date there are no findings of discriminatory conduct. The Charges filed by Lewis recited general discriminatory misconduct by Local 242 as to contractors generally. However, the complaint alleged discriminatory conduct only as to the AGC-contractors and only under the hiring hall clause. Since there were no requisitions from these affiliates, there was no discriminatory conduct. Since there was no discriminatory conduct alleged as to other contractors, no

findings could be made within the issues. True, both the Trial Examiner and the Board recited these numerous events. The Trial Examiner said he could make no findings of discrimination as to either the AGC-contractors or as to other contractors. (R. 331). The Board adopted these findings (S. R. 197; footnote No. 3 SR. 197. S.R. 207).

True enough, the Board reversed the Trial Examiner on the "implementation" matter (R. 45; SR. 205-206), but the reversal was not as to the findings of fact. The reversal was of the Trial Examiner's *per se* views of the "clause, implementation and Lewis":

> "But it seems to me that hiring hall provisions which are not stated in discriminatory terms do not become discriminatory simply because of the omission of an express prohibition against discrimination." (R. 30).
>
> "Hence, I do not agree that the provisions of Section 6 of the agreement between the AGC-Chapters and the District Council are invalid per se, and I find that by the mere fact of 'continuing (the agreement) in effect,' the Respondents have not violated any of the provisions of the Act." (R. 30).

The dispute between the Trial Examiner and the Board is clearly one of law and not of fact, for the Board said (S. R. 197):

> "The basic question herein is whether the written contract, apart from all other evidence in the case, is itself unlawful because of the exclusive hiring hall it contains. For purposes of our decision, therefore, it is unnecessary to determine whether there is sufficient evidence apart from the contract to support the allegation of discriminatory practices in hiring."

The General Counsel has not presented the

situation of Lewis as to the Board's view of "implementation of the unlawful contract." The General Counsel makes non-administrative findings of fact of discriminatory practices based on an alleged preferential practice of the union to prefer members over Lewis. This was not an issue in the case and is not the subject of any findings of fact by either the Trial Examiner or the Board. The numerous cases cited by the General Counsel need not be considered.

Since Lewis is posed as an (innocent) "victim of the unlawful hiring system" (GC-Br. p. 34; S. R. 206), it is a case of *damnum esque non injuria.* The clause being legal, any implementation of it by means not otherwise unlawful, is likewise legal. Lewis' legal rights were not prejudiced.

I. Answer to "III. The Board properly found that Local 242 . . . attempted to compel Lewis by threats and promises to withdraw an unfair labor practice charge."

These findings are not subject to objection by us in the absence of exceptions. We concede that they are supported by substantial evidence.

IV. LEGALITY OF FIRST OPPORTUNITY CLAUSES

A. The Board Poses the "Clause, Implementation and Lewis" as *per se* Illegal.

1. *The Board Claims Discretionary Authority Mistakenly.*

The Board argues that the United States Supreme Court held in *Radio Officers Union v. NLRB,* 347 U. S. 17, 45, that where the employer conduct "inherently encourages or discourages union membership", despite absence of direct affirmative evidence of discrimination "it was imminently reasonable for

the Board to infer encouragement of union membership." In the Board's words "It is with this basic principle in mind that we judge this case and all exclusive hiring halls of this unrestricted and arbitrary type." (Opinion SR. 199-200). This language actually appears at p. 52, and on pp. 51-52 it appears that the quote is out of context and is not the holding of the court. *Radio Officers* is a consolidation of three cases. In *Gaynor* the union was obligated by law to negotiate the same wage scales for all employees but nevertheless executed an agreement which gave the union employees a higher wage. The court stated that certainly "the natural result of the disparate wage treatment in *Gaynor* was encouragement of union membership; thus it would be unreasonable to draw any inference other than that encouragement would result from such action" and "Obviously, it would be gross inconsistency to hold that an inherent effect of certain discrimination is encouragement of union membership, but that the Board may not reasonably infer such encouragement." (p. 51). In *Teamsters* Fowler was discharged at the request of the union because he had worked out of order under the union's unilateral rotation plan. The court stated (p. 52):

> "The circumstances in *Radio Officers* are nearly identical. In each case the employer discriminated upon the instigation of the union. The purpose of the unions in causing such discrimination clearly were to encourage members to perform obligations or supposed obligations of membership. Obviously, the unions would not have invoked such a sanction had they not considered it an effective method of coercing compliance with union obligations or practices. . . . Since encouragement of union membership is obviously a natural and foreseeable consequence of any employer discrimination at the request of

the union, those employers must be presumed to have intended such encouragement. It follows that it was eminently reasonable for the Board to infer encouragement of union membership, and the Eighth Circuit erred in holding encouragement not proved."

This case, as do all the others, holds that there must be some overt act, where the clause is patently lawful, to constitute discrimination of a nature from which it would be reasonable to infer "encouragement".

2. *Board Objects to Hiring Halls only When Exclusive.*

The Board holds that "The vice in the contract here considered and its hiring hall lies in the fact of unfettered union control over all hiring, and our decision is not to be taken as outlawing all hiring halls." (SR. 201). The General Counsel agrees (GC-Br. 12; 28).

3. *Board Infers "encouragement" from the exclusive feature.*

The Board's inference is not from any evidence of discriminatory conduct by Local 242 in this case (the Trial Examiner and the Board have not made any findings of discriminatory conduct by the union as to the AGC-contractors nor as to employers generally). The Board states (Opinion SR. 204-205):

"We would draw a similar line between the type of unfettered arbitrary hiring hall present here and one including the safeguards set forth above. The first case, revealing an unexplained and autocratic union fiat, fully warrants an inference of unlawful encouragement despite the absence of literal membership requirement; the latter situation, with its assurance to would-be

employees . . . . effectively rebuts any inference of unlawful union encouragement, and therefore does not support an inference of illegality."

4. *Question of Law or Question of Fact.*

(a) Board Poses "clause, implementation and Lewis" as a Question of Law (see Supra pp. 5-8).

(b) General Counsel Poses as Question of Mixed Law and Fact.

The General Counsel commingles *per se* consideration, with the "reasonable man" and non-administrative findings of facts (see supra pp. 5-8).

B. Hiring Hall Illegality Is A Question Of Fact.

1. *Legislative History.*

The Board (Opinion SR. 201-202, footnotes No. 8 and No. 9) has set out the legislative history after the 1947 Amendments were adopted (*Senate Report No.* 1827, 81*st Congress, Second Session, Committee on Labor and Public Welfare*). Senator Taft's comments could then reflect his considered opinions that:

> "The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them . . . Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, as long as they are not so operated as to create a closed shop with all the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union." (SR. 202, footnote No. 9).

Member Murdock wrote a dissent to an opinion which has not been published. It is obvious that the

Board's first unpublished opinion provided for the parties to negotiate "objective criteria", while the opinion (SR. 194, 202-203) requires specific criteria (Appendix No. 4). The Board states that it will approve exclusive hiring hall clauses *only* if they contain these criteria (SR. 202). It is apparent that member Murdock opposed all criteria whether objective or specific for he said (R. 62):

> "Nothing in Senator Taft's statement suggests or permits the conclusion that hiring halls without objective criteria are somehow evil and contrary to the Statute, but that hiring halls with such criteria are perfectly lawful as the majority finds. Senator Taft was in agreement with previous Board and court decisions to the effect that where the General Counsel had proved that an ostensible non-discriminatory hiring hall, was, in fact operated as a closed shop, or in an otherwise discriminatory manner, the practice was unlawful."

During the preceding session in the debates that preceded enactment of the 1947 Amendments Senator Taft cited examples of closed shops, particularly in the maritime industry on the West Coast, but stated that if:

> "the employer wants to use the union as an employment agency he may do so; there is nothing to prohibit his doing so. But he cannot make a contract in advance that he will only take the *men recommended by the union.*" (emphasis ours)[11]

With regard to the types of union security clauses and hiring hall clauses that would be held illegal, it is clear that only those which specifically provided for closed shop (or preferential hiring) on their

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[11] 93 Cong. Rec. 3836, II Leg. Hist. 1010; also see I Leg. His. 412, S. Rep. No. 105, 80th Cong., 1st Sess.

face. During the debate in a colloquy, Senator Donnell inquired whether under the Bill "an agreement providing that an employer would not employ anyone who was not already a member of the union, would be invalid", Senator Taft replied:

> "That is correct. I think the most direct case of that sort is to be found in the Maritime Industry on the Pacific Coast. *The testimony was that a provision similar* to the one the Senator from Missouri has referred to *led to a condition* on the ships engaged in the Alaska run *where there was no discipline* whatsoever . . . Of course, under such an arrangement a *man could not even get a job* unless the Union admitted him to union membership. The Bill will make such a contract *illegal.*"[12] (emphasis added).

2. *The (majority) Board Reverses Itself sub silentio.*

The General Counsel is not correct in his footnote statement (GC-Br. 16 No. 12) in asserting that "the legality of hiring halls under the Act has not been comprehensively treated by the Board in its decisions prior to this case.' and "The dicta relating to this issue that has appeared in earlier Board cases, however, do not appear to reflect a consistent position." The case *In re The Lummus Co.,* 101 NLRB 1628 is not *contra* to the other cases because as pointed out at p. 1637 the complaint did not allege, nor was there any proof as to what the agreement was between the respondent and the union. The order of the Board only went against discriminatory practices. The other cases are harmonious that hiring hall clauses of the "first opportunity" feature are not illegal. In *National Union of Marine Cooks and Stewards,* 90 NLRB 1099 (1950), 1106, member Reynolds dissented by forcing the issue thus:

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[12]Leg. Hist. 1421.

> "delegation of such complete and absolute control over hiring . . . would without more be tantamount to discrimination against non-members."[13]

This court in *Swinerton* construed the holding in that case to be, thus, (p. 514):

> "The Board has contended that adoption of a system of union referral or clearance also violates the Act absent a 'guarantee that the union does not discriminate against non-members in the issuance of referrals,' We do not believe *National Union of Marine Cooks and Stewards,* 90 NLRB 1099 (1950) supports this view. Although it was there noted that the provisions of an applicable labor contract prohibited such discrimination, the Board did not indicate that a referral system was *per se* improper absent a 'guarantee' of non-discrimination."

In *Pacific American Shipowners Association,* 90 NLRB 1099, there was an exclusive hiring hall clause which *expressly* banned discrimination by the union, and the Board held that the clause was not unlawful, pointing out that "the provision contained in the proposal that personnel be secured through the offices of the Respondent (the union) does not, on its face, require discrimination because of union affiliation (p. 1101)." Trial Examiner Marx in this case reasoned similarly to this court in Swinerton stating (R. 30):

> "In that regard, it may be noted that the Board in the Pacific American Shipowners case appears to have considered the statement of such a prohibition as an added, rather than the controlling, reason for its conclusion that the

[13] In that case the clause provided on its face for non-discriminatory administration. Reynolds took the position that no language could cure the vice of exclusive hiring clauses, and that the phrase was "windowdressing."

> hiring provision there involved was not unlawful. The sum of the matter is that the long standing precedent of the Pacific American Shipowners decision is applicable here . . . "

Further, the Trial Examiner in the case of *Int. Asso. of Heat & Frost Insulators, etc. Local* 31 (Rhode Island Covering Co.), 114 NLRB 1526, in considering a similar clause stated (p. 1536):

> "I do not agree with the General Counsel's contention that the contract was violative of the Act on its face. It does not of necessity imply that the Company understood to hire only union members." (then in a footnote states:) *"George D. Auchter Co. et al,* 102 NLRB 881, enfd. 209 F. 2d 273 (CA-5) cited by the General Counsel, involved a similar contract provision. While both the board and the court there held the provision illegal, it appears that they did so not on the basis of the provision standing alone, but rather 'in the light of the interpretation placed upon it by the Respondent'."

Very recently, the Board did not find an identical contract between the same AGC-Chapters and a sister union to Local 242, to be objectionable. In *Mountain Pacific, Seattle, Tacoma Chapters, etc. and Int. Hodcarriers Local* 276 (April 22, 1957), 117 NLRB 1319, the contract was identical except the word "contractors" was used in the place of "employers". The Board stated (1319-1320):

> "We find it unnecessary to pass upon the validity of the union security language . . . we do find . . . (1) that the manner of administration of the above contracts constitute a violation of . . . the Act."

And, we have this court's statement as to the Board's holding in *Hunkin-Conkey,* (*Swinerton* p. 514).

"This rule which we deem proper was recognized by the Board in Hunkin-Conkey Construction Co., 95 NLRB 433 (1951), where it was said an agreement that hiring of employees be done through a particular union's offices does not violate the Act 'absent evidence that the union unlawfully discriminated in supplying the company with personnel'."

For the long line of Board precedent, Hunkin-Conkey cited:

Missouri Boiler and Sheet Iron Works, 93 NLRB 319

Firestone Tire and Rubber Company, 93 NLRB 981

National Maritime Union, 7 NLRB 971

For additional precedent, see:

American Pipe and Steel Corp., 93 NLRB 54
Port Chester Electric Company, 97 NLRB 354
Juneau Spruce Corp., 90 NLRB 1805

Universal Food Service, Inc., 104 NLRB 1, 32 LRRN 1052.

Further, the Board has considered that its holdings heretofore have been to recognize the *per se legality* of such clauses, witness 19*th Annual Report of the Board,* p. 121, GPO (1954):[14]

". . . in several cases the Courts enforced orders remedying (discriminatory practices."

"Those cases reaffirmed the principles that (1) while a hiring hall referral arrangement is not in itself improper, Section 8 (a) (3) is vio-

[14] See also in accord:
14th Annual Report, p. 84, 86, GPO (1949)
15th Annual Report, p. 131, 179, GPO (1950)
16th Annual Report, p. 215, 217, GPO (1951)
17th Annual Report, p. 149, 230, GPO (1952)
21st Annual Report, p. 101 (1956)
22nd Annual Report, p. 88 (1957)

lated if the arrangement results in the discrimatory referral and hiring of union members. citing Eichleay v. NLRB . . . . NLRB v. Philadelphia Iron Works)"

3. *All Courts of Appeal Hold Hiring Halls to be per se Legal.*

In five circuits, the Courts of Appeal have considered first opportunity clauses patently legal and have upheld their legality "absent a guarantee that the union does not discriminate against non-members in the issuance of referrals. These cases are set-forth chronologically. This question was not presented in the *National Maritime Union* case, *infra.*

(a) *NLRB v. National Maritime Union* (CA-2, 1949), 175 F. 2d 686, presented a first opportunity clause which the Board held legal and that issue was not before the court. The Court quoted the Board as upholding the legality of a clause similar to the one here involved (p. 688):

> "Suffice it to say that the Board did not hold violative of the Act the mere hiring-hall provisions of the agreement which respondents demanded of the employers. In its decision, the Board said:
>
> > 'The hiring-hall provision in question does not on its face require that the companies discriminate in favor of the NMU members. Unlike the so-called 'closed-shop' contract, by virtue of which the employers are required to hire only such persons as are members of the contracting union, this provision requires only that the employer hire such persons as are supplied by the Union unless the Union is unable to provide the needed replacements'."

(b) *Del E. Webb Construction Co. v. NLRB* (CA-8, 1952) 196 F. 2d 841, 845, was cited by this court

in *Swinerton, infra,* with approval. There was an issue as to whether the contract provided for union preference, and the court decided that it did not and was legal:

> "The factor in a hiring-hall arrangement which makes the device an unfair labor practice is the agreement to hire only union members referred to the employer. See *American Pipe and Steel Corporation,* 93 NLRB 54."

(c) *NLRB v. Swinerton* (CA-9, 1953), 202 F. 2d 511, 513-514 involved two contractors who were installing machinery. While the labor contract with the Millwrights Union stated that "there was no limitation of the employer as to whom he shall employ", yet the hiring foreman misunderstood it and told the machinists officer and some six machinists applicants that applicants must get millwright clearance. Two of the machinists applied at the Millwrights for clearance and were told that no clearance would be granted and they would have to take an examination and pay $50. The factual situation was tantamount to a contract requiring union membership and a consistent practice. The court was, however, presented with the *per se* issue because of the position of the Board (p. 514):

> "The Board has contended that adoption of a system of union referral or clearance also violates the Act absent a 'guarantee that the union does not discriminate against non-members in the issuance of referrals'."

This court first decided that this was not the rule of the Board and stated (p 514):

> "Such a rule in practical effect shifts the burden on the question of discrimination from the General Counsel of the Board to the respondent. The rule which we deem proper was recognized

by the Board in *Hunkin-Conkey Const. Co.,* 95 NLRB 433 (1951), where it was said an agreement that hiring of employees be done only through a particular union's offices does not violate the Act 'absent evidence that the union unlawfully discriminated in supplying the company with personnel.' 95 NLRB at 435, Cf. *Del E. Webb Const. Co. v. NLRB,* 8 Cir., 1952, 196 F. 2d 841, 845."

This court has followed Swinerton in *NLRB v. Thomas Rigging Co.* (CA-9, 1954), 211 F. 2d 153, cert. denied 346 U. S. 814, and in *NLRB v. ILWU Local* 10 (CA-9, 1954), 214 F. 2d 778, 781. In both cases, the hiring hall was discriminatorily operated and enforcement went only against these practices.

(d) *NLRB v. George D. Auchter Co.,* (CA-5, 1954), 209 F. 2d 273, 277 involved a first opportunity clause which was administered by the parties so as to require union membership. The Board's order and the court's enforcement went to the illegal manner in which it was administered. The Board did not contend and the court did not hold that the clause on its face violated the Act.

(e) *NLRB v. F. H. McGraw & Co.,* (CA-6, 1953), 206 F 2d 635, 639 cites with approval the preceding cases of *Swinerton* and *Del Webb Cons. Co.* It not only holds that a first opportunity clause not preferential on its face is legal, but destroys the foundation on which the Board's position is lodged. Here, there was a closed shop written contract which was proscribed by law (p. 639), however

"In the instant cause, there was no unlawful discrimination against any individual employees, because, in spite of the fact that it was the normal policy of the union to give preference, first, to its own members, so many workmen were required for this gigantic building

> project that everyone who applied was accepted and employed, if qualified for the work with few exceptions not here relevant."

This case goes further than the preceding cases. In *Webb* the agreement was not to hire only union men, and men were hired at the jobsite. Here, the agreement was to hire only union men and there was no jobsite hiring. Yet the court reached the same result. The cases can be reconciled on the basis that here, although there was an executed closed-shop agreement, it was not "maintained" in the sense that anybody knew anything about it. In the *Mountain Pacific* case the same situation exists as to "maintenance."

The court found that everybody who applied to the union was hired for the job. The practice was tantamount to an exclusive hiring hall agreement which was non-discriminatory on its face. The court stated (p. 640):

> "The action of an employer in hiring workmen through a union by means of referrals from the union is held not to violate the Act, absent evidence that the union unlawfully discriminated in supplying the company with personnel."

(f) *Eichleay Corp. v. NLRB* (CA-3, 1953), 206 F 2d 799, 802, 803, cited with approval the preceding cases of *Webb, Swinerton* and *McGraw*. Here the international agreement with the employer required it to employ carpenters in preference to machinists and to comply with the local agreement, which in turn provided that the company would call the union for help, would refer all applicants to the union, and require carpenter membership. The union in practice preferred carpenters over machinists. Officials of the machinists union asked the company to em-

ploy machinists which was refused on the basis of the agreements. The court in effect distinguished the facts in the *McGraw* case by holding that it is "knowledge" of the discriminatory contract that makes it illegal, and that in such a case, job seekers are excused from applying (p. 803):

> "Given an agreement which discriminates in favor of the carpenters and knoweldge of that fact on the part of the IAM members,, it is certainly reasonable to conclude that no one applied because it appeared futile to do so, and that such agreement, in and of itself, encourages membership in the Carpenters Union."

The court stated (p. 803):

> "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer. A referral system is not per se improper, absent evidence that the Union unlawfully discriminated in supplying the company with personnel."

(g) *NLRB v. Int. Asso. of Heat & Frost Insulators, etc. Local* 31, CA-1, decided December 4, 1958, (unreported); CCH. par. 65,060; 43 LRRM 2207 confirmed the position of the Board that a first opportunity clause identical with the one in the instant case was legal:

> "It is not illegal for an employer to rely upon a union to provide it with employees. In some industries such as construction and shipping, where much of the work is necessarily of an intermittent nature and the employer's need for workers varies from day to day, a hiring hall or referral system has sprung up. Under this system the employer calls upon the union to supply him with necessary workers. However, if this system is operated so as to discriminate against non-union workers and makes possible only the

employment of union members, it is unfair labor practice."

In this recent case the Board held that a first opportunity clause was not per se illegal, in the words of the court:

> "The Board first found that the 'first opportunity' clause of the agreement, *supra,* between the Company and the Union, while not violative of the Act on its face, was carried out in such a discriminatory manner so as to prefer Union members and therefore, violated both Sec. 8 (b) (1) (A), and because it caused the Company to discriminate, Sec. 8 (b) (2) of the Act."

C. Situation of Applicants Applying for Work.

The Board has held that it is immaterial that there is no evidence in the record that there were any requisitions from the AGC-contractors on the days when Lewis applied for work (SR. 207). The Board assumes that "Had he gone directly to one of the Respondent Employers he would unquestionably have been rejected summarily and referred to the union hall for clearance . . . " (SR. 207). The Board asserts that these "are matters for investigation in the compliance stage of this proceeding." (SR. 208).

The Trial Examiner had the same problem and decided that the existence of a job, and its counterpart, application for a job was a necessary component of liability and not a matter of remedy (R. 34):

> "However, the General Counsel takes the position in his brief, as he did, in effect, at the hearing, that 'the determination of the extent of the discrimination' is a matter for the compliance stage of the proceeding . . . . The General Counsel's position, and his reliance upon cited case, beg the question, for what is at issue here is not 'the determination of the extent of the

> discrimination,' but whether the evidence will support a finding of discrimination, whatever its extent, by members of the AGC Chapters . . .; there can be no finding that it (Local 242) discriminatorily exercised the authority delegated to it by members of the AGC Chapters if there is no evidence that at any time since the effective date of the agreement, any of these members sought or requisitioned labor from Local 242 . . . "

The General Counsel argues (GC-Br. 18):

> "no evidence of an actual refusal to hire or a discharge is necessary . . . ; (that applications for work) would be a 'futile gesture' and (the applicants) are therfore excused from testing the matter."

Where the discriminatory practice is established by independent evidence and jobs are given to members of the union, non-union persons do not have to apply for jobs under the authority of

> *NLRB v. Swinerton* (CA-9), 202 F. 2d 511, 514
> *Eichleay v. NLRB* (CA-3), 206 F. 2d 199, 803
> *NLRB v. Waterfront Employers* (CA-9), 211 F. 2d 946, 954
> *NLRB v. Local* 420, *United Association of Journeymen and Apprentices* (CA-2), 239 F. 2d 327, 330

However, general discriminatory practices by Local 242 is not within the issues, and there are no findings to that effect under the issues. Secondly, here there were no job requisitions, nor union members working.

Where the employer refers applicants to the union with the statement that they must get clearance from the union, and the union discriminatorily refuses to dispatch them, these applicants do not not have to re-apply, if jobs were not then existing,

at a later time when the jobs exist. Further, as to a group of applicants, where all are told by the employer to get clearance from the union and the union discriminatorily refuses to dispatch some, the others do not have to apply.

Swinerton; Waterfront Employers, supra.

Where the contract is proscribed and was maintained, but not executed, implemented or administered, we know of no cases where back wages were given to a charging party when he did not apply for a job, or when there was no job available. In this situation, the Board has dismissed complaints. In *Newton Bros. Lumber Co.* (1955), 103 NLRB No. 46, 31 LRRM 1557, the Board held that the lack of an allegation in the complaint by the General Counsel that there was a job available and that the charging party was qualified for an available job, bars a finding of discrimination. In *Monart Motors Co.* (1953), 103 NLRB No. 90, 31 LRRM 1564, the Board refused to find that a respondent-employer had committed an unfair labor practice for refusing to hire an applicant because the applicant was requested to drop an unfair labor practice filed against another employer, where the evidence failed to show that there was a position available for the applicant (the applicant wanted part-time employment).

D. Enforcement of General and Broad Orders Obnoxious to Courts.

Here, the Board wants enforcement of what the Board terms a *per se* illegal contract, in the absence of findings that it has been enforced, administered and implemented. Assuming for the moment that there is a proscribed contract, the courts have shown reluctance to enforce Orders of the Board which are

general and which go beyond the specific acts found to have been committed by the respondents.

The position of the Board here is that a non-discriminatory exclusive clause might be administered in a discriminatory manner, but not necessarily so. Its position is basicly that it wants enforcement of a general order enjoining the respondents from violating the Act in a general way.

In *Lummus,* and *Shuck, supra,* the courts restricted the enforcement to those specific acts which the court found had been violated and refused to enforce a general order which enjoined violation of the Act in general terms. The reasoning behind these cases was aptly stated by the United States Supreme Court in *NLRB v. Express Publishing Co.* (1940), 312 U. S. 426, 435. In that case the employer was found to have refused to bargain in good faith and the Board order adopted the phraseology of Sec. 7 and banned violation. The court stated (435):

> "In view of the authority given to the Board by Sec. 10 (c) is carefully restricted to the restraint of such unfair labor practices as the Board has found the employer to have committed, and of the broad language of Sec. 10 (e) authorizing the courts to modify the order of the Board in whole or in part, we can hardly suppose that Congress intended that the Board should make or the court should enforce orders which could not appropriately be made in judicial proceedings. . . . In the light of these provisions we think that Congress did not contemplate that the courts should, by contempt proceedings try alleged violations of the NLRA not in controversy and which are not similar or fairly related to the unfair labor practices which the Board has found."

It would seem that the statutory language of the

Act, Sec. 10 (e) and the *Administrative Procedure Act,* Sec. 1007 requiring substantial evidence to support findings of the Board, would mitigate against any assumption that the parties in executing an exclusive hiring hall clause intended to violate the Act by discriminatory enforcement. The courts not only require explicit findings of misconduct, but that the findings be supported by substantial evidence (supra pp. 15-19). This assumption does violence to both rules.

E. Legality of Specific Safeguards.

(1) *The Board's Decision and the General Counsel Contrasted.*

The Board held that it would "find a (hiring hall) agreement to be lawful on its face, *only if the agreement explicitly provided that*: . . . . " (emphasis added). It stated further that it was not interested in the evidence of practices pursuant to implementation, enforcement and administration (SR. 197), nor was it interested in whether the employers subject to the agreement had any job requisitions (SR. 207).

On the other hand, the General Counsel stated that "nothing in the Board's decision suggests that a hiring hall must be found invalid where, on balance no showing of unlawful encouragement can be made", and that this decision is based on the assumed unique facts in the building and construction industry. (GC-Br. 21, 28).

Subsequent events prove the General Counsel in error. [15] In fact, the *General Counsel* in a *public* state-

[15] In (Miller dba) KM & M Construction Co., 120 NLRB No. 140, CCH par 55, 398 (1958), the Board held "that the **Mountain Pacific** case laid down three criteria which if met **fully** and **in toto** would save (a hiring hall) arrangement from the

ment on June 27, 1958, 42 LRRM 261, 267, in response to a question inquiring whether the union and employer can agree that workers will not be rejected by the Employer save for "good cause", stated that:

> "in the light of the *unqualified language* in which this criterion (Employer's right to reject) is phrased it would seem that the right of rejection contemplated thereby is an *unconditional* one, in no way limited, for example, by considerations of good cause as (the inquiry) suggests." (emphasis added).

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interdiction of the Act. Though the clause in question in the instant case met one of the three criteria, the reservation to the employer of the right of rejection . . . it failed to meet the other two criteria. It therefore did not meet all of the criteria required" (emphasis by the Board). The Board has applied this formula not only to written agreements but to practices, **Hod Carriers Local** 324, **Roy Price, Inc.,** August 14, 1958, 121 NLRB No. 55, CCH, par. 55, 630.

Further the Board has applied this doctrine to all hiring halls irrespective of industry:

Houston Maritime Association, 121 NLRB No. 57, 42 LRRM 1364 (shipping industry), where the contract contained provisions against discrimination;

Los Angeles-Seattle Motor Express, Inc., 121 NLRB 205, 43 LRRM 1030 (trucking); pending on Pet. for Rev., Court of Appeals for District of Columbia;

Philadelphia Woodwork Co., 121 NLRB No. 201, 43 LRRM 1031 (manufacturing);

E & B Brewing Co., 122 NLRB No. 50, 43 LRRM No. 118 (brewing industry);

Plumbers and Schenley Distillers, Inc., 122 NLRB No. 16, 43 LRRM 455 (distilling industry);

Further, the Board's Brown-Olds remedy *(In re United Association, etc.,* 115 NLRB 594, 37 LRRM 1360) which requires both unions and employers to refund all dues, initiation fees, etc., paid by all members or applicants (regardless of whether they were involved in the proceeding) commencing with the period beginning 6 months prior to the filing of the Charge, is now applied to *Mountain Pacific* cases. Cf. In re Houston Maritime Assn., and Los Angeles-Seattle Motor Express Co. cases supra.

(2) *"CLASS" Determination by the Board is Illegal.*

The Board's decision here regulates hiring halls *as a class* in all industries, including the building and construction industry, by requiring three specific "criteria" to be set forth in the written agreements. In *NLRB v. General Drivers Local* 986, (CA-5), 225 F. 2d 205, 209, the Board was reversed for prescribing a situs test to judge the propriety of picketing:

> "Indeed such a theory would . . . elevate the Board 'formulated criteria' by judicial fiat to a vantage point from which it could in effect, circumvent the statute . . . (by) substituting Board inferences, based purely on its judgment as to propriety and arequacy of the means employed . . . for the sole statutory test of unlawfulness . . ."

Although the Board has some power to decline to assent to the exercise of its jurisdiction on a case by case basis, its declination of jurisdiction over labor unions as a class was arbitrary. *Office Employees Int. Union, Local* 11 *v. NLRB* (1956), 353 U. S. 313. Similarly, with respect to the hotel industry, it was held that the Board could not decline to assert jurisdiction. *Hotel Workers v. Leedom,* ..... U. S. ....., 3 L. Ed (2d) 143, 79 S. Ct. 150.

(3) *Effect of Criteria in General.*

The Board will not approve an exclusive hiring hall clause unless it contains *all* these rigid, inflexible criteria:

(a) the requirement for non-discriminatory language is imposed as a remedy prior to the commission of any discriminatory conduct, and is the normal remedy imposed by the Board in hiring cases after complaint, hearing and conviction for violat-

ing the discrimination provisions, except that the proviso "except as authorized by Section 8 (a) (3) of the Act" is not included;

(b) the second requirement gives the employer the unqualified right to reject any job applicant, and thus immunizes conduct which we think is violative of the Act;

(c) the third requirement of posting, in effect requires both to state publicly that they will not violate the Act, and state that the employer can violate the Act by unqualified right of rejection.

(4) ***Posting Criteria.***

Sec. 10 (*a*), (*b*) *and* (*c*) provide that the Board to prevent any person from engaging in an unfair labor practice must follow the procedure of a Charge filed by a person claiming to have been injured by the violation, investigation, complaint, notice, hearing in accordance with rules of evidence prevailing in district courts of the United States, findings supported by substantial evidence, and order. Only thereafter may the Board prescribe and secure enforcement of "such affirmative action . . . as will effecuate the policies of the Act." *Garner v. Teamsters,* 346 U. S. 485.

The requirement for posting for the duration of the agreement constitutes an improper, unwarranted and unauthorized imposition by the Board. The Board prescribes a remedy in advance of a discrimination violation, and brands the parties as perpetrators of Section 8 (b) (2) and Sec. 8 (a) (3) violations, without the statutory safeguards. It requires more because the Board has never previously ordered the posting of the agreement.

(5) *Right to Reject Criteria.*

The employer does not have an unqualified right to reject any or all applicants referred by the union under the Act. He could use that power to "encourage" or "discourage" union membership. He cannot lawfully reject an applicant because he is or is not a member of the union, nor because he has filed charges or given testimony under the Act, or for any other ground which would constitute a violation of Sec. 8 (a) (1).

Employers have the duty, it would appear, to bargain regarding initial employment *Brown & Root, Inc.* 86 NLRB 520, and to bargain over future reemployment of laid-off employees, seniority and grievance procedure *In re Hagy,* 74 NLRB 1455; *West Boylston Mfg. Co.,* 87 NLRB 808. It is common to have clauses in labor agreements in which employers agree not to reject applicants for union activity, preferential right of old employees on recall, seniority, etc. If the employer refused to negotiate, the Board would make him bargain, and after an agreement is reached, the Board would make him put it in writing. An adamant employer could nullify such provisions by the power of rejection, which the Board gives him as an unqualified right. By the right of rejection, the employer can nullify constitutional rights by discriminating because of race, color and creed. [16]

The sanctity of the collective bargaining process was recently brought to the attention of the Board

[16] This is not to say that employers here follow discriminatory practices. However, we do not wish to minimize our interest in these subjects. The Unions here involved, through their International, are open unions, accepting into membership all who follow the calling, and is the largest of the building and construction unions. The union is a melting pot for all races, colors and creeds.

by the United States Supreme Court, *Local* 1976, *United Bro. of Carpenters v. NLRB,* 357 U. S. 93, 108, 2 L. ed (2d) 1186, 78 S. Ct. 1011, in holding that the Board "has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice."

Again, in *NLRB v. Rockaway News Supply Co.,* 345 U. S. 71, 75, 79, 73 S. Ct. 519, 31 ALR (2d) 511, 97 L. ed 832, the court stated:

> "Substantive rights and duties in the field of labor management do not depend on ritual reminiscent of medieval property law. . . . There is no reason apparent why terms should be implied by some outside authority to take the place of legal terms collectively bargained. The employment contract should not be taken out of the hands of the parties themselves . . . "

F. The Use of a Labor Pool is Not Violative of the Act.

In *Hunkin-Conkey,* 95 NLRB 43, the Board found that an agreement whereby personnel was secured through the union was not violative of the Act, absent unlawful discrimination. To the same effect is *Missouri Boiler and Sheet Iron Works,* 93 NLRB 319; *Firestone Tire and Rubber Co.,* 93 NLRB 981; *National Maritime Union,* 78 NLRB 971; *American Pipe and Steel Corp.,* 93 NLRB 54; *Port Chester Electric Company,* 97 NLRB 354; *Juneau Spruce Corp.,* 90 NLRB 1805; and *Universal Food Service, Inc.,* 104 NLRB No. 6, 32 LRRM 1052.

V. SHIFTING THE BURDEN OF PROOF.

We have already explained the substantive law implications of the Board's *per se* views. The procedural problem is no less serious, involving the shifting of the burden of proof. This court's *Swin-*

erton, supra, and member Murdock (R.58-59) considered the problem solely in its procedural aspects.

1. ***Clause Without the Criteria Held a Discriminatory Violation.***

The Board, by not requiring proof of discriminatory practices, is deciding discrimination and derivitively coerce-restrain violations from the mere execution and maintenance of the agreement (maintenance refers to publication only). The *per se* view of the "clause, implementation and Lewis" makes execution and maintenance violative of the Act even when enforcement, implementation and administration is non-discriminatory. This ridiculous result flows from the Board's views that evidence of discriminatory practices or lack of them is immaterial (SR. 197) and evidence of requisitions is immaterial (SR. 207-208). The General Counsel's "counter-point" statament (GC-Br. 21) is not the Board's position and is a gratuitous inconsistency.

This result would not follow if the Board (or General Counsel) assumed the burden of proving the facts. The General Counsel argues that actual discriminatory practices make-up the Board's case (supra p. 27-28), and that the Board's case cannot be stated independently of the practices (GC-Br. 27, footnote No. 20). He states that he is willing to assume the burden of proof under *Swinerton,* but limits the burden to a showing of inferences and not discriminatory facts (GC-Br. 32-33). This is not enough.

2. ***General Counsel Assumes Burden Only When Clause Contains Criteria.***

We assume that the General Counsel would assume the burden of proof to show discriminatory

practices when the clause contains the criteria. But the statute and decisional authority makes no such distinction. Murdock confronted the majority of the Board with this court's views in *Swinerton* over three months before the Board released its final opinion (R. 58-59) but the majority ignored the decision and stated no basis for avoiding its impact.

3. *Argument—General Counsel Has Burden to Show Discriminatory Practices.*

It is commonplace, particularly in criminal prosecutions, where the *corpus delicti* is shown to have been committed, to resort to motive and opportunity to identify the defendant as the wrongdoer. But motive and opportunity are not a substitute for proof of the commission of the act itself. Thus in *Interlake Iron Corp. v. NLRB* (CA-7, 1942), 131 F. 2d 129, the court refused enforcement based on the Board's findings of discriminatory layoff:—

> "It is not sufficient for the Board to show that the system is capable of being discriminatorily. It must go further and show that it was used discriminatorily . . . The Board cannot shift the burden of proof or impose what it chooses to call the duty of the company to go forward with the evidence by showing that the system of merit rating used in facilitating a layoff is subject to discrimination . . . The company does not have to prove non-discrimination because of union activities. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man does not shift from the Board."

The rule was succinctly stated in *NLRB v. Gottlief* (CA-5, 1938), 208 F. 2d 682:

> "We also keep in mind that the burden is on the Board to prove affirmatively and by substantial evidence the facts which it asserts."

The burden never shifts is held in *NLRB v. Winter Garden Citrus Projects* (CA-5, 1958), 238 F. 2d 138:

> "It is not and never has been the law that the Board may recover upon failure of the respondent to make proof. The burden is on the Board throughout to prove its allegations, and this burden never shifts."

In *NLRB v. McGahey,* (CA-5, 1956) 233 F. 2d 406, cited with approval in *Swinerton,* it was held that respondent can remain mute and illegal inferences are not to be inferred:

> "The employer does not enter the fray with the burden of explanation . . . An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present substantial basis of believable evidence pointing toward the unlawful one."

This court stated in *NLRB v. Kaiser Aluminum etc. Co.,* (CA-9, 1954), 217 F. 2d 366:

> "The General Counsel has the burden of the issue. Although the Board is entitled to draw reasonable inferences from the evidence, it cannot create inferences where there is no substantial evidence upon which these may be based."

In *NLRB v. Reynolds International Pen Co.* (CA-7, 1947), 162 F. 2d 650, it was held:

> "The Board argues the discriminatory nature of these discharges as though the burden was upon respondent to exonerate itself of the charges made against it. The burden however, was upon the Board to prove affirmatively and by substantial evidence that (employees) were discharged because of union membership and activities and for the purpose of discouraging membership in the union."

To the same effect is *NLRB v. Union Mfg. Co.,* 124 F. 2d 332; and *NLRB v. Miami Coca Cola Bottling Co.,* (CA-5, 1953), 222 F. 2d 341.

This court subsequent to its *Swinerton* decision rejected the notion that respondent must undertake the duty of disproving unlawful conduct. *NLRB v. Thomas Rigging Co.,* (CA-9, 1954), 211 F. 2d 153. The appellate function was outlined in*NLRB v. Englander Company, Inc.* (CA-9, 1598), 260 F. 2d 67, 70:

> ". . . to view the evidence in the light of the record in its entirety and to set aside the order if not supported by substantial evidence."

VI. ERRONEOUS FINDINGS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Footnote No. 3, S. R. page 197.

If the following statement constitutes findings of fact under the issues, and if "employers" refers to AGC-affiliates, then we except on the basis that the same is not supported by substantial evidence, to-wit (Footnote No. 3, SR. 197):

> "The Union admitted that in doing the *hiring* for the employers it always hires its *members in preference* to non-members, and that whenever a member is not immediately available, it attempts to locate one, and only failing in the search does it ever refer a non-member to any assignment. If the contract were not unlawful on its face, we would deem the record as a whole ample to support a *factual inference* that the *Employers* in fact *hired* hod carriers and common laborers through this union hall and that the Respondents in fact hired such employees on behalf of the contractors in the *closed shop manner* which the Union admitted." (emphasis added)

The first sentence, and the last clause of the last sentence, both relating to alleged discriminatory policy and practices of Local 242 were outside the issues, and these recitals, as well as other recitals by the Board and Trial Examiner were not the subject of any findings of fact of the existence of a dis-

criminatory policy. In fact, the Trial Examiner specifically stated that there was no evidence of a discriminatory policy as to the AGC-affiliates nor as to any other employer (R. 33-34, 35). See discussion supra pp. 12-15.

We have also urged *,ibid,* that the assertion that "Employers in fact hired hod carriers" and that they were dispatched by Local 242 does not refer to AGC-affiliates, but refers to other employers, outside the issues of this case. If we err, then we here assert that such an interpretation is not supported by substantial evidence. Such an interpretation would be in conflict with the Trial Examiner's specific findings, and in such cases the question is resolved by inquiring whether there is substantial evidence to support the Trial Examiner's findings. *Universal Camera Corp. v. NLRB,* 340 U. S. 474, 490, 493. At p. 496, the court stated:

> "We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."

To the same effect is the recent case by this court, *NLRB v. Englander Co., Inc.* et al, (CA-9 1958), 260 F. 2d 67.

We rely on the General Counsel's statement that he had no evidence of any requisitions (R. 223-224) by AGC-contractors.

B. Trial Examiner's Recitals of Requisitions by non-AGC Employers.

If it is asserted that requisitions by employers, not affiliated with the AGC-Chapters, is material to the issues and that this statement constitutes such

a finding, then we assert that it is not supported by substantial evidence. This statement is a summary of recitals by the Trial Examiner, to which we assert there is no substantial evidence, to-wit:

> "However, notwithstanding the season and the statements made to Lewis to the effect that no work was available, hod carriers were dispatched to jobs from the union's hiring hall, some repeatedly, on a substantial number of occasions during the months of March, April and May 1956, while Lewis was at the union's office seeking, and failing, to secure dispatch. Contrary to the claim advanced by Allman in his testimony, the evidence does not credibly establish that the hod carriers dispatched were specifically requested by the employers to whose projects they were sent." (R. 16).

We do not believe that there is any evidence to support this recital. He said that Allman's testimony was not credible (R. 16 footnote). The only testimony that there were jobs during this period was that of Allman, and we assume that the Trial Examiner believed him in part when he said that "contractors were calling their men back", meaning their former employees. However, the Trial Examiner is not entitled to believe something that Allman did not say. Allman said that these were phone calls from contractors who wanted to know the phone numbers and addresses of the former employees and that Allman supplied this information. Allman did not say that he was dispatching these men. (R. 165-166). The contractors had the right to call for specific men (R. 15). The Trial Examiner had no right to fill the vacuum. That vacuum was never filled because Lewis testified that he did not know of any jobs during that period, and if he had known of any jobs, he would have taken them (R. 156). This recital does not meet the standards of this court for

substantial evidence. In the recent case *NLRB v. Englander, Supra,* p. 72 this court stated:

> "We recognize the power of the Board to draw reasonable inferences from the evidential facts found at the hearing."

C. Trial Examiner's Recital that Local 242's Practices Applied to Non-AGC Requisitions.

We also except to that portion of the following recital of the Trial Examiner which assumes that there were jobs available:

> "I have no doubt that Allman repeatedly applied this policy to Lewis prior to the latter's dispatch on May 17 and referred union members to jobs in preference to Lewis because the latter was not a member of Local 242."

for the reason stated above.

D. Board's Recital That Lewis Would Have been Rejected By AGC-Contractors.

The recital "Had . . . (Lewis) gone to one of the Respondent Employers he would unquestionably have been rejected summarily and referred to the union hall for clearance . . . " is not supported by substantial evidence. (S. R. 207).

This is merely a suspicion, not supported by any evidence. The Trial Examiner had the same suspicion (R. 35, footnote No. 15), but the Trial Examiner nevertheless refused to allow a suspicion to be the basis for a finding (R. 33-34, 35). If this is a finding by the Board, it is in conflict with the Trial Examiner's and must fail because the Board has not pointed out what witnesses it believes and what evidence it relies upon. *Universal Camera Corp v. NLRB,* and *NLRB v. Englander, supra.*

The AGC-Chapters sent out bulletins advising the affiliates not to require union membership as a condition of employment (GC. Ex. 5; AGC Tac. Ex. 1; R. 81-82; 89; 116). It is presumed that had Lewis

applied, they would not have rejected him for non-membership in the union.

E. Board's Finding That Local 242 Executed the Agreement.

Local 242 is not a signatory to the labor agreement (GC. Ex. 4). Local 242 was not charged in the complaint with "execution" of the agreement (par. XI), nor did the Charge of Lewis allege "execution". The Trial Examiner called the Board's attention to this condition of the record (R. 23, footnote No. 9). There was no evidence to support the Board's finding that Local 242 violated the Act by "executing" the agreement. (R. 45 and footnote No. 1; SR. 205 and footnote No. 11).

CONCLUSION

1. The contract was not executed or maintained (published). The Board's finding that Local 242 executed the contract was erroneous. The discriminatory practices, which are outside the issues, existed independently of the contract. The contract was not used as the cause, reason or justification for denial of dispatch of Lewis. It was never mentioned.

2. As a substantive law proposition, the Board's *per se* illegality holdings constitute conclusive presumption which does not require proof (SR. 197) and which precludes proof. It allows Lewis and "any employee or would-be employee who believes himself a victim of discriminatory practices" (Opinion SR. 203) back wages in the absence of requisitions for jobs and in the presence of actual *non-discriminatory* practices, because the practices are immaterial (SR. 197, 207). The rule in cases such as the Board's *Universal Food Service,* the Sixth Circuit's *McGraw* and this court's *Thomas Rigging Co.* would be reversed. In its procedural aspects, it not only shifts the burden of proof but removes it. Where the lawful

clause does not contain the safeguards, the General Counsel does not have the burden. He only has the burden when the clause contains the safeguards. The Board's *per se* views usurp the legislative prerogative in both aspects. The Congressional intent, sustained by all court decisions and Board decisions to this date, makes the illegality of hiring hall contracts turn on a question of fact—actual discriminatory practices.

3. The Trial Examiner and the Board specifically found no implementation (R. 33-34, 35; SR. 207). The Board misunderstood these findings in holding that there was implementation, and its disagreement with the Trial Examiner was not over the facts but over the *per se* attributes. Lewis is not entitled to back wages regardless of whether the contract is viewed as legal or illegal.

4. The Board assumes that the parties will violate the law with a lawful contract unless the contract contains clauses stating they won't violate the law. In case of violation of law, the Board does not need the prop of a contract violation.

5. The criteria do not eradicate the evil complained of. The reason for the criteria is a fear of a discrimination violation, but the Board nevertheless with an anti-discrimination clause holds the contract is discriminatory, absent the other criteria. The Board requires both parties to post that they won't violate the law, but that the employer can violate it in his right to reject.

This court should deny enforcement.

Respectfully submitted,

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INDEX TO APPENDIX

APPENDIX No. 1:

Pertinent Statutory Provisions

The *Administrative Procedure Act,* 5 U. S. C. A. 1007, provides:

(b) . . . All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . . "

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

Rights Of Employees

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided* . . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the

exercise of the rights guaranteed in section 7: *Provided* . . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . . .

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practices (listed in Section 8) affecting commerce. . . . .

(b) . . . the Board . . . shall have power to issue and cause to be served upon such person a complaint . . . : *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . .

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair practice, and to take such affirmative action including reinstatement of employee with or without back pay, as will effectuate the policies of this Act.

(d) . . . . . .

(e) . . . The findings of the Board with respect to questions of fact supported by substantial evidence on the record considered as a whole shall be conclusive. . . . .

APPENDIX No. 2

D. Summary of the Intermediate Report

The Trial Examiner found that the contract with its hiring clause was not *per se illegal* (R. 30), either as to a violation of Sec. 8 (a) (1) (3) or as a violation of Sec. 8 (b) (1) (A) or (2) (R. 36); found that Local 242 had illegally induced Lewis to drop the charges in violation of Sec. 8 (b) (1) (A) of the Act (R. 37); found that the contract had not been implemented in the continuous rejections of Lewis for work because the only issue under the complaint was job opportunities afforded by the respondent AGC-Chapter affiliates "since there was no evidence since the effective date of the agreement that any of these members sought or requisitioned labor from Local 242" (R. 35); that there the issue was "whether the evidence will support a finding of discrimination, whatever its extent, by members of the AGC Chapters" (R. 34), and that "the critical fact is that there is no such evidence." (R.35); that the complaint does not allege that the AGC-Chapters by maintaining the hiring hall clause "discriminated in violation of Section 8 (a) (3) of the Act (see Par. XI of the complaint)" (R. 23, footnote No. 9), also see page 12 supra; that the complaint does not allege that the execution of the contract by any of the parties constitutes a violation of the Act (R. 23, footnote No. 8)—see Complaint, Board's Exhibit 1; that prior to Lewis' "dispatch on May 17 (Allman, dispatcher of Local 242) referred union members to jobs in preference to Lewis because the latter was not a member of Local 242" (R. 32-33); but nevertheless "Despite the discriminatory treatment accorded Lewis by Local 242, the record will not support a finding that any members of the AGC Chapters (or, for that

matter, any other employer) discriminated 'with respect to the hire of Lewis,' as the complaint alleges, and that Local 242 caused such discrimination, within the meaning of the Act." (R. 33); that on May 9, 1956, Buchanan of Local 242, who had seen Lewis working in connection with moving a building, told Nielson that "he would place a picket line at the project unless Nielsen hired only union members for the work in progress there, but that Lewis nevertheless worked until quitting time and finished the job" (R. 17-18)[1]; that with respect to the Todd Shipyard job, he discredited Allman's testimony that the job required a much smaller man than Lewis (R. 32, footnote No. 14), but he disregarded the Nielson and Todd Shipyard episodes as being any evidence that "any members of the AGC Chapters (or for that matter, any other employer) discriminated with respect to the hire of Lewis, . . . and that Local 242 caused such discrimination within the meaning of the Act" (R. 33) because "the General Counsel advances no claim that Local 242 caused Nielsen (who is not a member of any of the Chapters) to discriminate against Lewis", "nor does the complaint include an allegation that Local 242 caused Todd's Shipyard to discriminate against Lewis. There is no evidence that the firm (Todd's)

[1]Nielsen testified that he was moving a building as a subcontractor, for the Teamster's Union (R. 117); which creates an inference that Buchanan's interest was on behalf of the Teamster's Union and does not represent the general policy of Local 242. There was no evidence to show how Buchanan knew that Lewis was working. Lewis testified that he had been at the union hall all morning, and on his way home, about noon, he saw the job in progress and was given a half-day's work moving this building for the Teamster's Union (R. 216). It is to be noted that the contract has no form of union security, and that Lewis was refused membership at a time when there was no work available according to Allman, Buchanan, and Lewis. because Lewis would "need the money to eat on." (R. 172).

is a member of the Chapters", nor that Nielson or Todd's satisfy the commerce requirements[2]. After finding no discriminatory practices, the Trial Examiner succintly concluded thus:

> "But it seems to me that hiring hall provisions which are not stated in discriminatory terms do not become discriminatory simply because of the omission of an express prohibition against discrimination." (R. 30);

and:

> ". . . I do not agree that the provisions of Section 6 of the Agreement between the AGS Chapters and the District Council are invalid per se, and I find that the mere fact of 'continuing (the agreement) in effect,' the Respondents have not violated any of the provisions of the Act." R. 30).

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[2]The Trial Examiner at the hearing struck the testimony as to the Nielsen job except as evidence of a general practice, undoubtedly on the basis of a general discriminatory practice by the union (R. 169). We can infer that the Trial Examiner made these findings because there was no other competent evidence of a discriminatory practice by Local 242. While there was no motion to strike the Todd episode, we may infer that the Trial Examiner disregarded this episode as constituting any evidence of a general discriminatory practice for the same reason.

APPENDIX No. 3

E. Summary of the Board's Decision and Order, and Opinion

The Board found that Local 242 had violated the Act by "executing" and maintaining in effect the hiring provisions in the Opinion (S. R. 205, footnote No. 11) and similarly in the decision and Order (R. 45, footnote No. 1)[3].

The Board posed the question (R. 197), and its legal conclusions, thus ((S. R. 197):

> "*The basic question herein is whether the written contract, apart from all other evidence in the case, is itself unlawful because the exclusive hiring hall it contains. We hold the hiring hall provisions of this contract to be unlawful. For purposes of our decision, therefore, it is unnecessary to determine whether there is sufficient evidence apart from the contract to support the allegation of discriminatory practices in hiring.*[3]"

The Board's footnote No. 3 is the subject of a serious dispute between the Geenral Counsel and these Respondents. It is discussed in the topic:

"F. Footnote No. 3, S. R. p. 197" (p. 12, 75)

The Board states: "However, we do not read the statute as necessarily requiring elimination of all hiring halls and their attendant benefits to em-

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[3]Lewis' Charge did not describe "execution", and the Complaint did not allege "execution." The Trial Examiner called the Board's specific attention to this state of the pleadings (R. 23, footnote No. 9). Further, the Trial Examiner in naming the parties to the Agreement had omitted Local 242 as a signatory (R. 10). The Agreement itself was before the Board (Board's Ex. 4). The Board's Opinion does not describe the signatories.

ployees and employers alike." (S. R. 201). "It was to eliminate wasteful, time-consuming and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers that the union hiring hall as an institution came into being. It has operated as a crossroads where the pool of employees converges in search of employment and the various employers' needs meet that confluence of job applicants." (SR 201, footnote No. 8). The Opinion relies upon the Congressional intent as evidenced by Mr. Taft's comments on the majority report, Senate Report No. 1827:

> " 'The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them.' "
>
> The Board and the Court found that the manner in which the hiring halls operated created in effect a closed shop in violation of the law. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions, as long as they are not so operated as to create a closed shop with all the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union." (S. R. 202, footnote No. 9).

The majority held that an exclusive hiring hall agreement gives to the union the "unfettered union control over the hiring process" and violates the Act because of "the inherent and unlawful encouragement of union membership" (S. R. 202); and further, that the exclusive hiring hall agreement by itself proves "the allegation of discriminatory prac-

tices in hiring", "apart from all other evidence in the case." (S. R. 197).[4]

The Board then states that an exclusive hiring clause can be converted into an agreement which is "non-discriminatory on its face, *only* if the agreement explicitly provided that . . . . "

The three criteria which are rigidly imposed are to be inserted in all agreements providing for "referral to jobs . . . on a non-discriminatory basis", and the provision that the "employer retains the right to reject any job applicant referred to the union." The third criteria requiring posting of all provisions of the hiring arrangement including the safeguards. (S. R. 202-202).

The purpose of the safeguards is "to rebut the inference that . . . (the exclusive hiring clause) encourages membership in the Respondent Unions." (S. R. 205).

The Board finds violations of the Act:

"Accordingly, we conclude that the Respondent Employers have violated Section 8 (a) (3) (1) of the Act. and the Respondent Unions have violated

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[4] While the Board and the General Counsel have meticulously avoided the use of the term **per se,** the Trial Examiner used the term 4 times to describe this proposition, and member Murdock used the term twice. The Board has used the term in other cases,and the courts have used the term frequently. When the safeguards are inserted the Board states that the agreement is then "non-discriminatory on its face." (S. R. 202).

This definition by the Board not only describes the **per se** doctrine, but defines it. The Board states that the exclusive hiring hall agreement is inherently illegal, from which you can infer encouragement of union membership in violation of the Act.

We would paraphrase it by stating that the Board holds the clause creates a **conclusive presumption which does not require proof,** (and to test the **per se** doctrine, we would have to add) **and which precludes proof.**

Section 8 (b) (2) and (1) (A) of the Act, by executing and maintaining in effect the hiring provisions of their contract." (SR. 205). * The footnote explains that only Local 242 is found to have executed the agreement, within the six months statutory period.[5]

The Board further found:

"3. We also find, contrary to the Trial Examiner, that the implementation of the unlawful contract * in the rejection of Lewis' continuous applications for employment * was an unfair labor practice by both the Union and Employer Respondents. He was a clear victim of the unlawful hiring system being carried on." (S. R. 205-206).[6]

The Board makes the same recitals of evidence as the Trial Examiner with respect to the alleged discriminatory practices and treatment of Lewis, except the Board does not recite the Todd Shipyard episode, as does the Trial Examiner (although apparently he gave it little or no effect) and the General Counsel (S. R. 206-207).[7]

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[5] The Board did not have in mind that the AGC-Chapters were not charged in the complaint with a violation of Sec. 8 (a) (3), nor that Local 242 was not a signatory to the agreement. The Board did not consider that the complaint did not allege the violation of the Act by the "execution" as to any respondent.

[6] We understand this statement to mean that any implementation, enforcement or administration of a per se unlawful contract would be illegal, so that the denial of Lewis, or any other applicant of a dispatch, even on grounds which would in the absence of such a clause be lagel, is nevertheless an illegal implementation. The General Counsel on the other hand appears to take the view that implementation is illegal only when it is independently illegal, for instance, when the denial is on the basis of non-membership.

[7] However, the Board does not conclude therefrom that these recitals constituted discriminatory practices or conduct as to Lewis, because the Board stated that it was "unnecessary to determine whether there is sufficient evidence apart from

The Board relegated the question of requisitions by the "Respondent employers" on the days when Lewis was rejected "for investigation in the compliance stage of this proceeding", wherein the "amount of back pay" due Lewis can be determined (S. R. 207-208).

We have omitted the Board's argument on the numerous points.

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the contract to support the allegation of discriminatory practices in hiring." (S. R. 197). However, we must not ignore the footnote No. 3.

The footnote stated that the hiring hall was operated "in the closed-shop manner in which the Union admitted." The General Counsel says that the Board "found" that the AGC affiliates in fact used this hiring hall, and that the union applied its practices of non-membership discrimination as to the AGC-contractor requisitions. We will urge elsewhere, that the Trial Examiner held that the AGC-contractors did not requisition help and that there was no evidence in the case, under the isues, that the union applied the alleged discriminotary practices to the AGC-contractors or any other employers. There is nothing in this footnote which is contrary to what the Trial Examiner found, and we shall show that the word "employers" in the footnote does not refer to the AGC-affiliates. We conclude that there is also a lack of a finding by the Board that Lewis was the vehicle for the "implementation" of the contract.

APPENDIX No. 4

F. Summary of Murdock's Opinion

The Board's Decision and Order rendered Dec. 14, 1957 (119 NLRB No. 126) was conditioned upon the rendition of a Subsequent Opinion (R. 45), which came out over 3 months later on March 27, 1958 (119 NLRB No. 126-A). Murdock wrote a separate opinion (R. 55) which concurred in part and dissented in part (R. 63) on Dec. 14, 1957.

Murdock argued that previously the Board had held with the Courts that an exclusive hiring hall clause was not per se illegal (R. 55-56). He found it contrary to decisions of the Ninth, Sixth and Third Circuit Courts of Appeals.[8]

Murdock argued that since the law requires "that an exclusive hiring hall be administered in a nondiscriminatory manner . . . , the real issue here is whether, as the Court of Appeals for the Ninth Circuit pointed out, the burden of proof on the question of discrimination will be shifted from the General Counsel to the Union administering a hiring hall. In the instant case the majority presumes that the Union will administer an otherwise lawful con-

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[8]The scribe has erred because he in fact referred to a decision by the 8th Circuit. To the four decisions he referred to, to-wit (S. 27-28):

Del E. Webb Construction Co. v. NLRB, CA-8, 1952, 196 F. 2d 841, 845.

NLRB v. Swinerton, CA-9, 1953, 202 F. 2d 511, 514.

NLRB v. F. H. McGraw & Co., CA-6, 1953, 206 F. 2d 511, 514.

Eichleay Corp. v. NLRB, CA-3, 1953, 206 F. 2d 799, 803.

must be added the decision of:

NLRB v. Int. Asso. of Heat & Frost Insulators etc. Local 31, CA-1, Dec. 4, 1958. CCH par. 65,060, 43 LRRM 2207, (not officially reported).

Further, the rule has been confirmed in the Ninth Circuit thrice, and in the Third twice.

tract in an unlawful manner. This presumption is made conclusive unless the contract includes 'objective criteria' which will explain and justify 'the exclusive aspect of hiring hall referrals.' Only thereafter,I take it, will the burden of proof he shouldered by the General Counsel to establish that the Union nevehtheless administered the contract in a discriminatory manner." (R. 58-59).

Murdock considered the legislative intent (R. 59):

> "But the Statute places the burden of proof squarely on the General Counsel to establish in every case that a respondent before this Board has engaged in an unfair labor practice. The majority, indeed, admits that the statute does permit an exclusive hiring hall, pointing to the salutary objective served by such institutions and a statement by Senator Taft that the closed shop provision of the Taft-Hartley Act was not aimed at the hiring hall of the type administered in the maritime industry."

Murdock considered the injection of "objective criteria" on the basis of the majority's opinion as of Dec. 14, 1957 thus (R. 61):

> "The majority holds that the standards for referral of applicants are 'matters primarily for the employer and the union to negotiate and settle' so long as they fall within the majority's notion of 'typical objective standards.' But the majority is free in the very next case to hold that the union and employer have incorporated insufficient criteria or that the criteria adopted by the parties is not, in the majority's opinion, typical."[9]

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[9] It thus appears that the Board's opinion on Dec. 14, 1957 was withdrawn, and that the Board withdrew the plan for "objective criteria" and substituted rigid criteria, outside the scope of collective bargaining which would be the **only** ones that would meet the test (S. R. 202). We shall see that the

Murdock took the position that the question of illegality of hiring halls, where the agreement is lawful on its face, is a question of fact (R. 62), and that the burden of proof was on the General Counsel to show illegality (R. 58-59).

We are confused by Murdock's "concurring in part" because he made no recitals of the evidence nor findings of fact (R. 63).[10]

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permission of rejection gives the employer the right to reject applicants for illegal reasons. We therefore have the situation of both parties being required to post a notice that they will not violate the law and will follow certain rules, which rules in some aspects give the employers the unilateral privilege of violating the law.

[10] This is discussed at p. 17A.

APPENDIX No. 5

G. Rationale of Murdock's Opinion

Member Murdock wrote a dissent to a non-existent majority Opinion December 14, 1957, which presumably delegated to the parties the responsibility through collective bargaining to devise the criteria. He objected that the prescription of this formula was illegal because the legislative intent was to treat exclusive hiring halls no different than any other agreement, if they were patently legal. That is, the practice of the parties would determine the question of legality. Since this was a question of fact, the burden was on the General Counsel to prove an illegal practice. He objected, following the rationale of this court in *Swinerton,* that the adoption of a *per se* view would shift the burden of proof.[11]

However, we are confused by Murdock's "concurring in part", in the absence of any findings of fact by Mr. Murdock (R. 63):

> " would therefore find that the contract in this case is not *per se* unlawful, but that the union's discriminatory practices under it are unlawful, * including the coercion and discrimination as to Lewis." *

Both the Board and the General Counsel have ex-

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[11]The respondents also assert that the **per se** view affects the substantive rights of the parties and invades the function of the Congress. It would seem that a **prima facie** view would shift the burden of proof. A **per se** view goes further. The Board said that it was not interested in the evidence (S. R. 197). This is more than a **prima facie** doctrine, and more than simply shifting the burden of proof. It is a conclusive presumption which presumes proof and precludes proof. The General Counsel does not appear to present this view when he says that proof of a legal practice will not make a **per se** illegal clause violative of the Act. (GC-Br. p. 21). Only Congress can change the substantive rights of the citizenry.

pressed themselves. The Board's Decision and Order (R. 46) states:

> "(3) Also in disagreement with the Trial Examiner, we find that the implementation of the unlawful contract in the rejection of Lewis' continuous applications for employment was an unfair labor practice, and that the Respondent Unions thereby violated Section 8 (b) (2) and (1) (A) of the Act and the Respondent Employers thereby violated Section 8 (a) (3) and (1) of the Act." to which the Board appended footnote 2.

We have seen that under the issues the only *implementation* alleged was with respect to requisitions by the AGC-affiliates. We have also seen that the Trial Examiner found that there were no such requisitions. Footnote No. 3 S. R. 197 finds that requisitions were made by other employers, not affiliates of the AGC-chapters and outside the issues. The Board did not reverse the Trial Examiner's finding that the AGC-affiliates made no requisitions. There was thus no vehicle on which Lewis could implement the contract. We have seen that the Board mis-interpreted its own findings in this "(3) implementation" holding. Now, the disagreement with the Trial Examiner was not over the factual situation, but over the legal issue of whether *any* implementation would *per se* violate the Act.

Since Murdock made no findings and relied on the Trial Examiner's findings (he could not rely on the footnote No. 3, because that was not released for over 3 months later), we conclude that he likewise mis-interpreted the Trial Examiner's findings. Murdock was wrong in holding that

> "the union's discriminatory practices under . . . (the contract) are unlawful"

because there were no requisitions under the contract. Likewise Murdock's holding that the

> "discrimination as to Lewis"

violated the Act, since the only issue was discrimination under the contract with the AGC covering their affiliates only. His holding that "the coercion . . . (of) Lewis" was violative, was undobutedly derivitive, and since the discrimination finding fails, the derivitive perishes.

That leaves us with the Board's interpretation of Murdock's concurrence, (R. 46, footnote No. 2):

> "Member Murdock concurs in the finding of a violation with respect to Lewis for the reasons indicated in his attached opinion."

This is in error and a distortion of Murdock's position. Murdock vigorously opposed the Board's per se views. The Board's "implementation of the unlawful contract" is a *per se view,* which does violence to Murdock's views.

We believe that the General Counsel has correctly phrased not only what the Board and Murdock agree to, but what the Trial Examiner found (GC-Br. 10):

> "In addition, the Board unanimously concluded that Local 242 had unlawfully refused to refer Lewis to jobs."

But there, we part company, because the General Counsel argues (GC-Br. 5) that AGC-affiliates requisitioned employees through the hiring hall as a matter of fact. The Trial Examiner found that during the crucial period of Lewis' rejections employers were requisitioning help (R. 16) but not the affiliates of the AGC-Chapters (R. 33-34). The Board found that other employees were requisition-

ing help (footnote No. 3 SR 197; see this brief p. 12), and did not reverse the Trial Examiner on his other holding. In fact, the Board adopted it inferentially by stating that it was not necessary to consider the absence of such evidence of lack of requisitions (S. R. 197). We therefore do not agree with the General Counsel in his interpretation of the above quoted statement. We suggest that his interpretation, but not his statement, is in error.